

VANDALISM OF CULTURAL RESOURCES:
THE GROWING THREAT TO OUR NATION'S HERITAGE

COMPILED BY

DEE F. GREEN AND STEVEN LEBLANC

CONTRIBUTIONS BY

MARK BARNES
JANET FRIEDMAN
DEE F. GREEN
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MARTIN E. McALLISTER
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LANCE R. WILLIAMS

APRIL 1979



# Cultural Resources Report

USDA FOREST SERVICE
SOUTHWESTERN REGION
ALBUQUERQUE, N.M.

NO. 28

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# CONTRIBUTORS

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JANET FRIEDMAN - Dr. Friedman is currently the Chief Archeologist for the Forest Service based in Washington, D. C. Prior to her current assignment, she was a member of the Hells Canyon National Recreation Planning Team. In this capacity, she served as archeological advisor to Forest Service Law Enforcement and the U.S. District Attorney's Office in the Sheridan, Osman, Holman violation in Hells Canyon. Janet holds a Ph.D. degree from Washington State University.

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STEVEN LEBLANC - Dr. LeBlanc is currently Director of the Mimbres Foundation and Research Assistant Professor at the University of New Mexico. He has served as archeological advisor to the Forest Service on the Mimbres Culture of southwestern New Mexico and has been involved in State and National initiatives for stronger legislation to protect cultural resources from vandalism. Steve holds a Ph.D. degree from Washington University, St. Louis.

MARTIN E. MCALLISTER - Mr. McAllister is currently Forest Archeologist on the Tonto National Forest, Arizona. He is an archeological advisor to Forest Service Law Enforcement and the U.S. Attorney's Office in the Jones, Jones, and Gevara case on the Tonto National Forest and is working on additional enforcement problems and cases. He is Chairman of the Arizona Archeological Council's Committee on Law Enforcement. Martin holds an MA degree from San Diego State University and is pursuing a Ph.D. at Arizona State University.

PAUL E. MINNIS - Mr. Minnis is a graduate student at the University of Michigan and has done field work in Colorado, New Mexico, Arizona, Missouri, Maryland, and Chiapas, Mexico. He has directed site survey in southwestern New Mexico for the Mimbres Foundation and performed analysis of microplant remains. Paul is pursuing a Ph.D. degree with a dissertation on the archeological indicators of food stress in the Mimbres area.

BRUCE E. RIPPETEAU - Dr. Rippeteau is currently State Archeologist for Colorado and President of the National Association of State Archeologists. His article, "Antiquities Enforcement in Colorado," appeared in the January 1979 issue of JOURNAL OF FIELD ARCHAEOLOGY. He has been active in antiquities enforcement in the State of Colorado and with John Deans organized the Antiquities Enforcement Symposium held in Denver on November 9, 1978. Bruce holds a Ph.D. degree from Case Western Reserve University.

LANCE R. WILLIAMS - Mr. Williams is a recreation specialist with the Department of Interiors Bureau of Land Management. His interests in antiquities enforcement are tied to proper recreation management of cultural resources and have produced the only widespread survey of the problem in the western United States. His Master's thesis has been published under the title, "Vandalism to Cultural Resources of the Rocky Mountain West," Cultural Resources Report No. 21, USDA Forest Service, Albuquerque. Lance holds an M.A. degree from Colorado State University.

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# PREFACE

The purpose of this volume is to bring together a diverse collection of material, otherwise not available, concerning cultural resource site protection in the United States. The main focus is site destruction on Federal land and the failures and successes of the various land management agencies in stopping the looting. It turns out that this focus is most timely since just before we go to press, Representative Morris Udall (D-Ariz) introduced HR1825 the "Archaeological Resources Protection Act of 1979." An identical bill (S490) has been introduced in the Senate by Senator Pete Domenici (R-NM). Thus, the new wave of concern for site protection so evident in the papers in this volume is being expressed at the highest public levels.

Papers by Friedman and McAllister discuss the problem with reference to particular cases in the jurisdiction of the Ninth Circuit Court. Green provides a review of cases in New Mexico (Tenth Circuit). While the main focus of this volume has to do with Federal resource management, it is clear that the problem of archeological site protection must be viewed as a nationwide problem. Public education and awareness coupled with vigorous enforcement of the law surely decreases looting and enhance protection activities regardless of land ownership. A demonstration of the scope of the overall problem and relationship between Federal and non-Federal concerns are provided in a paper by Minnis and LeBlanc dealing with a series of sites on State lands. Barnes, then, provides a review and evaluation of Federal preservation cases in the state and private sector.

The volume contains considerable documentation of very severe site destruction and could be construed as a statement of failure. While we do not deny a poor track record in the past, we see recently a strong new active concern for America's excellent cultural heritage. Land managers, archeologists, law enforcement personnel, prosecutors, judges, and congressmen have, in recent years, all begun to realize the magnitude and seriousness of the problem and important steps have followed. It is this new attitude we hope to see pursued and trust this document will foster that effect.

Dee F. Green
Steven LeBlanc
Albuquerque
March 1979

# VANDALISM OF CULTURAL RESOURCES: THE GROWING THREAT TO OUR NATION'S HERITAGE

By

Dee F. Green and Steven LeBlanc

In 1974, a landmark case (U.S. vs. Diaz) raised an issue of constitutionality which has become a topic of interest and concern for archeologists, lawyers, law enforcement officers, and judges alike. The case involved one Ben Diaz who had removed several Apache ceremonial masks of recent manufacture from a cave on the San Carlos Reservation. He was cited under the 1906 American Antiquities Act (34 Stat. 225) and found guilty by a District Court. The conviction was overturned, however, by the Ninth Circuit Court of Appeals who ruled that the Act was "unconstitutionally vague" since ". . . Nowhere here do we find any definition of such terms as 'ruin' or 'monument' (whether historic or prehistoric) or 'object of antiquity' . . ." (Federal Rep. 115).

The 1906 Act, prior to 1974, served as the basic piece of legislation under which criminal penalties could be imposed for violation of cultural resources. All of the considerable additional legislation (McGimsey 1972) passed on behalf of cultural resources has been aimed at regulatory kinds of functions to insure a guarding of the resource on Federal lands from activities of the Government itself or private enterprise working on Government lands. Apparently, so long as the 1906 Act remained intact, few thought to seriously question its criminal provisions.

With the Diaz decision, however, there was suddenly a serious problem with enforcement authority for depredations against cultural resources especially in the Ninth Circuit. This loss of ability to effectively prosecute coincided with a time period when cultural sites were being destroyed through depredation by vandals at an alarming rate and with increasingly sophisticated methods involving mechanized equipment. Unfortunately this trend not only continues today but is accelerating as a consequence of the Diaz and subsequent decisions.

An effort to correct the effects of the Diaz decisions was attempted within the Ninth Circuit when the United States vs. Jones, Jones and Gevara was heard in 1978 under theft (18 USC 641) and destruction (18 USC 1361) of Government property. At this writing (March 1979) this strategy has been hampered by the decision of Judge Copple (1978, see McAllister, Appendix II, this volume) who ruled that the case could not be brought under the above statutes since the 1906 Act was the specific Act designed to deal with antiquities offenses. He, therefore, dismissed the case since the 1906 Act

was unconstitutionally vague. The United States has appealed the decision to the Ninth Circuit Court which heard the appeal during January 1979. A decision is expected as we go to press. If the Court decides in favor of the United States, the defendants will be brought to trial. If the Court rules against the United States, the issue of appealing the decision to the Supreme Court will be addressed by the Department of Justice.

In an attempt to avoid the consequences of the Diaz decision, the USDA Forest Service in rewriting its Prohibitions (36 CFR 261) avoided citing the 1906 Act as its authority to issue regulations and used instead its Organic Act authority. Forest Service regulations provide essentially similar penalties for vandalism against cultural resources as does the 1906 Act; that is, both treat the offense as petty. There has not yet been a formal challenge to the Forest Service regulation specifically dealing with this issue [36 CFR 261.9(e)]. However, in a 1978 case involving vandalism of a site on the Tonto National Forest, Arizona, the issue of the relationship of Forest Service regulations to the 1906 Act and Diaz decision was raised. The Forest Service continues to maintain (McAllister, Appendix I, this volume) that its regulations are independent of the 1906 Act and therefore not under the influence of the Diaz decision. A guilty plea by the defendant has prevented a test of the issue in the courts. On lands under the jurisdiction of the Department of Interior, the situation is variable. Departmental regulations (43 CFR 3.15) cite the 1906 Act (16 USC 432) and thus may not prove usable by agencies within Interior. There is relief for the National Park Service, however, since they have a set of prohibitions [36 CFR 2.20(a)(1)] against "possession, destruction, injury, defacement, removal or disturbance" of any "building, monument, . . . artifact, relic, historic, or prehistoric feature."

Currently within the Ninth Circuit our ability to enforce penalties against the destroyers of our cultural heritage is dubious. There is petty offense authority only on National Forest and National Park lands, hardly a deterent to those who are systematically raping sites for crass commercial gain. The trend of site destruction for commercial purposes established over the past decade is currently accelerating as a result of the Diaz and Copple decisions.

Within the confines of the Tenth Circuit the situation is somewhat better although petty offense penalties are simply a cost-of-doing-business risk for commercial operators who can realize large returns from the sale of artifacts. New Mexico, is suffering considerably from commercial operations due to the high prices (up to $8,000) Mimbres pottery currently brings on the commercial

market. Two recent convictions, one of which involved a jail sentence for the defendents, has probably helped stem the tide of commercial vandals. A tough State antiquities bill against users of mechanized equipment has also helped. One commercial operator of this sort is believed to have left New Mexico and reestablished in Arizona.

The New Mexico convictions involved four individuals; two of which (Quarrells) were found guilty in magistrate court under the provisions of the 1906 Act, despite a defense based in part on the Diaz decision (Green, this volume). The other two individuals (Smyer and May) were convicted in district court and sentenced to jail terms. Their case has been appealed to the Tenth Circuit Court and as in the Jones, Jones, and Gevara case, we are expecting a decision on the appeal as we go to press. Here again the defense was based in part on Diaz. Judge Howard K. Bratton, in a well-reasoned opinion (Green, Appendix I, this volume), has upheld the constitutionality of the 1906 Act. Interestingly, between the Quarrell and the Smyer-May cases there was a magistrate decision in the Tenth Circuit which supported Diaz. This was handed down in U.S. vs. Carmazine (Green, this volume; Collins and Green, 1978).

Although the rate of site destruction may have abated somewhat in New Mexico due to the referenced convictions, it is also possible that the looters are simply taking more precautions against detection. A thin, law enforcement capability spread over the millions of acres of Federal lands in the State creates a situation in which some risks are probably still worth taking due to the commercial value and low cost even if caught and convicted. C.B. radios, ORV equipment, nightime digging, false bottom tents, specialized tools and other techniques continue to offer looters throughout the country opportunities to destroy heritage values. In the following pages, we have brought together a series of articles, legal opinions, and other documentation which we hope will be instructive and useful to all who are interested in the problem. In a final note, we have some suggestions about remedies.

We have not attempted a lengthy polemic in support of the value of our heritage or cultural resources. To us it is self-evident that they matter for many reasons. The realization that a people's heritage is important was expressed many years ago when Cicero declared, "Not to know what has been transacted in former times is to be always a child. If no use is made of the labors of past ages, the world must remain always in the infancy of knowledge." The precarious nature of the modern world in terms of the multitudinous problems attendant in both the social and physical environ-

ments should signal that we can ignore the past only to our own peril. Yet, an understanding of that past can only occur if the resources to study it remain available for that study and do not wind up the victims of destruction and commercialism.

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# CULTURAL RESOURCE PROTECTION

# IN

# HELLS CANYON NATIONAL RECREATION AREA

# OR

# HOW MUCH DOES AN ARTIFACT COST?

by

Janet Friedman

## Introduction

It was January of 1978 when I first heard the question: "How much does an artifact cost?" I answered with my standard 20-minute lecture on the intangible values of cultural resources. "Archeology cannot be evaluated in terms of dollars, but in educational, esthetic, scientific worth," I said. "Professional archeologists cannot measure value based on an odious black market which ethically they are obliged to ignore," I added. As a matter of fact, I had run through most of the standard cliches on the issue before I was stopped. My questioner assured me that, having taken some introductory archeology classes, he was sympathetic to the cause. However, he needed to ascertain the monetary value of an artifact.

The discussion in question took place with a Law Enforcement Officer on one of the Ranger Districts on the Wallowa-Whitman National Forest where I worked as Archeologist for the Hells Canyon National Recreation Area Planning Team, I was responsible for planning the direction for management of the archeological and paleontological resources of the NRA. However, a large part of my job also involved public relations, including fielding questions from involved lay people.

The District had received information regarding pothunting which was taking place, and the officer wanted to make sure that he was well prepared before going out into the field to apprehend the suspects. Informants had indicated that three people were illegally digging an archeological site in Hells Canyon on the Oregon side of the Snake River (Figure 1). The 662,000-acre area had been set aside by Congress as a National Recreation Area (NRA) in Public Law 94-199 in 1975, in part, because of the rich historic and prehistoric resources present there in pristine condition (Appendix 1). The resource, thus, had been identified as present and important; the appropriate officials were concerned.

The region is remote and isolated. Cache Creek, the site of the looting, can be reached only by jet boat from Hells Canyon Dam north to Wild Sheep Rapids, followed by a steep and tortuous 4-mile hike to the site. Suspicions had first been aroused when the Oregon State Department of Fish and Game received information that three potential poachers had entered the canyon with firearms in the off season. Later, a local commercial jet boat operator reported to the District Ranger that he had observed three people digging for arrowheads.

DETAIL MAP

# HELLS CANYON NATIONAL RECREATION AREA

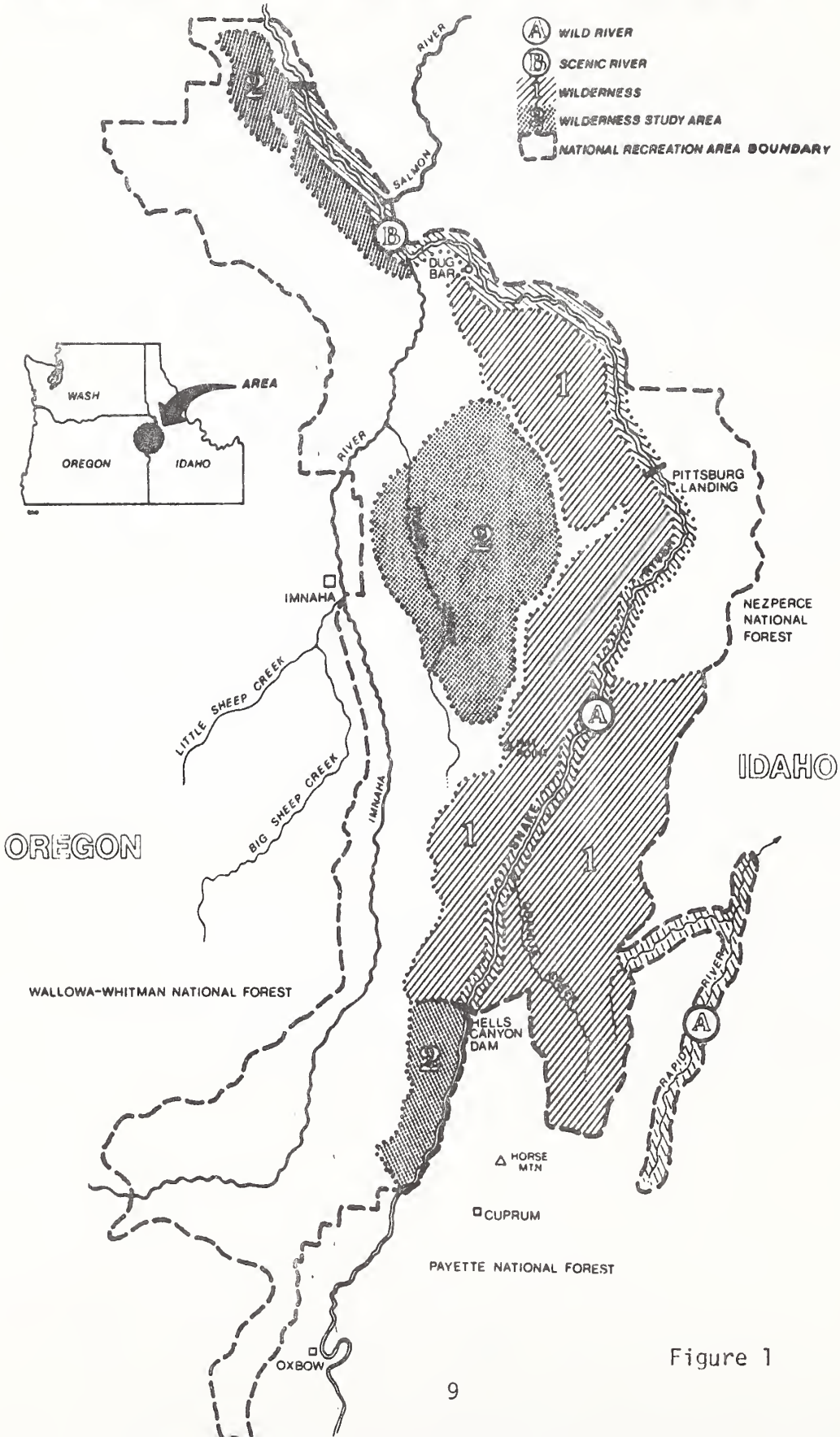


Figure 1

## The Offense

The Forest officers decided that it was an opportunity to take action. But before they became involved, they wanted to make sure that they were prepared, that nothing they said or did at this point would become a technicality on which the case could be invalidated. They sought information from everyone from the Assistant U. S. Attorney to the NRA Archeologist. At 5 o'clock the next morning, law enforcement teams from the Forest and Oregon State Department of Fish and Game left Baker, Oregon, for the Snake River. From Hells Canyon Dam, they traveled by chartered jet boat to the drop-off point just before the impassable Wild Sheep Rapids. Two people who were standing on the bank mistook the law enforcement officers' boat for the charter for which they were waiting, and walked down to the water's edge.

The two, Stephen Sheridan and Judith Holman, were asked about game violations. They said that they had been camped and looking for arrowheads at Cache Creek; Sheridan had artifacts in his pack and pockets. The two were cited under CFR 261.9(e) which gives the Forest Service responsibility for protecting cultural resources on its land (Appendix II).

The group, consisting of the officers, Sheridan and Holman, hiked the trail to Cache Creek, reaching the high overlook from which they were able to see a man far below digging and screening in a rockshelter site. Alerted by Holman's screams, the man ran to hide his equipment and treasures, but not before his picture was snapped by an alert officer. The group then hiked the remaining distance down to the site.

Cache Creek is a minor tributary of the Snake River. At the confluence is a wide, flat bench which apparently was ideal for human habitation, judging from the numerous house pits on the bench, and evidence of utilized rock shelters on the periphery. A similar nearby rockshelter had been radiocarbon dated at over 7,000 years B.P. The site had been placed on the Oregon State inventory 4 years earlier and the report form noted, "Of the 65 miles of Hells Canyon that my survey covered, this site was far and above the most important complex encountered" (Bransford 1974:2).

When the law enforcement officers reached him, the third suspect, David Osman, was given his rights. Eventually, he recovered the screens, shovels and artifacts he had hidden. The recovered material was seized as evidence, tagged with identifying information, photographed, and carefully recorded. He was cited, but allowed to remain in the canyon to complete his vacation because law enforcement officers did not have the authority to remove him. The situation, they explained, was analogous to allowing a driver to remain in his car after having been cited for speeding.

## Evaluation

Two days later, law enforcement officers; Forest Archeologist, Dr. Edward Friedman; a private contract archeologist from the University of Idaho, Dr. Ruthann Knudson; and I visited the site with Special Law Enforcement Agent, J. R. Walker, in order to assess the damage. What we found was discouraging. Every "likely spot" along the 4-mile trail had been tested and disturbed to some degree. Three rockshelters at Cache Creek had been damaged severely and backfilled. The surface was littered with lithic debitage, shell, charcoal, bone, and artifacts less showy than the arrowheads the diggers were seeking. The evaluation indicated that great damage had been done to an important site.

Once the evaluation of damage was complete, the citations under Title CFR 261.9(e) were dismissed, despite efforts by a defense attorney to have the suspects plead guilty, pay their fines, and be done with the matter. The Federal Grand Jury indicted the three on felony charges under Title 18, United States Code sections 641, 1361 and 2, Theft of Government Property, Destruction of Government Property, and Aiding and Abetting (Appendix III). The Assistant U. S. Attorney handling the case, Kristine Olson Rogers, was deliberate in her choice of statutes under which to prosecute. The U. S. Department of Justice had strongly encouraged her to use this as a test case to question, and potentially overrule, the Diaz decision of 1974. As the result of that decision, the Antiquities Act of 1906 had been declared unconstitutional in the Ninth Circuit Court of Appeals because it was considered "fatally vague."

Many experts agreed with the judge in the Tenth Circuit who declared that the Diaz decision applied only to the specific circumstances of the Diaz case. They hoped that by trying a more clearcut antiquities violation under the Antiquities Act, it would be possible to overturn that unfortunate decision. Ms. Rogers was anxious to avoid the potential problems resulting from the Diaz decision. In addition, she preferred to pursue the greater penalties associated with theft and destruction ($10,000 and 10 years maximum per count) rather than the wrist-slap sentences ($500 and 90 days maximum) under the Antiquities Act or the CFR.

The only problem with this approach is that the criterion which separates a felony from a misdemeanor charge is the monetary value of the property in question. Thus, it is necessary to place a dollar value on the artifacts, leaving the larger question--how much does an artifact cost? Our judicial system is accustomed to seeing value in terms of monetary worth. The severity of a crime is ascertained, and the severity of the penalty determined on the basis of the dollar costs. How is one to decide how serious a crime is if the costs cannot be determined?

In an effort to solve the problem, I called archeologists as well as antiquity dealers throughout the country. Archeologists were willing to help, but unanimously lacking in knowledge regarding the price of artifacts or the appropriate way to solve the problem. Their responses ranged from a warning to drop the case rather than establish a dangerous precedent of pricing artifacts to a museum curator, David Cole, who agreed to perform an evaluation. Dealers were wary and understandably hesitant to become involved by providing assistance.

Because there seemed to be no immediately available alternative, an evaluation was contracted for and completed. After much work, it was determined that 222 artifacts confiscated from the suspects totalled a value of $282 (Appendix IV). A major cultural resource had been demolished, and all we could discuss was the negligible amount the material would bring as "framies" on the antiquities market. The total was sufficient to bring the charge from a misdemeanor to a felony, yet the implications were depressing and frightening.

## Results

The Grand Jury indicted on two felony counts for each suspect (Appendix V). Trial was set for June 1978 in Portland, Oregon. We had urged that the trial be held in a large urban center instead of in eastern Oregon. It was hoped that way it might be possible to avoid having the case heard before a jury of pothunters.

Before the date of the trial arrived, the defense attorneys met with the prosecutor. The Assistant U. S. Attorney had suggested that she would consider allowing the less culpable Sheridan and Holman to plead guilty to a misdemeanor, insisting upon felony charges for Osman. However, at this point, the defense attorneys joined forces saying that Sheridan and Holman would testify that Osman was being charged with a felony for doing exactly what they had done for a misdemeanor. Concerned that this maneuver might jeopardize the entire case, the three were allowed to plead guilty to the lesser charges. The Government recommended a 5-year sentence of 6 months in jail and 4 year, 6 months probation, plus 100 hours of public service work related to archeological preservation in Hells Canyon.

In the end, the three did plead guilty to misdemeanor charges--Osman to one count each, theft and destruction, Sheridan to one count destruction, and Holman, one count aiding and abetting destruction of Government property.

The trio was sentenced on August 21, 1978. Prior to sentencing, the Honorable George E. Juba, Federal Magistrate, noted the severity of the offenses. The defendants were fined $500 each. In addition, each was sentenced to 1 year in jail, suspended, and 1 year probation. Each must serve 50 hours of public service work in Hells Canyon in addition to other penalties.

## Implications

The case is completed but the major question remains--how is it possible to prosecute such cases without prostituting ourselves and our profession by attaching a price tag to the resource? Several avenues may be worthy of pursuit:

1. One of the most promising directions is that which could be followed at the conclusion of criminal proceedings. Evaluation and cost estimate for salvage of the remaining portions of the site were written by a private contractor immediately after the damage had been done. That document could form the basis of a bill to the defendants. The site was safe and well-protected during the thousands of years that it remained underground. The destruction resulting from the pothunting, however, opened the site to erosion and the potential continuing ravages of pothunters and grazing animals. Thus, because the Forest Service will be forced to salvage the site as a direct result of the actions of three persons, the three should be responsible for paying the costs of that effort. This could be a heavy fine price ranging into thousands of dollars and it is uncertain that a court under a civil damage suit would require that a maximum be paid. Despite this, the action could make defendants rather uncomfortable and help to warn others of the potential penalties awaiting future looters.

2. Throughout the course of this case, it has continually been suggested that the monetary value of a site is the amount of money which the Government is willing to expend to excavate, protect or interpret it. Thus, a site which may be excavated at a cost of $30,000 as mitigation of adverse effect is worth that amount to the Government. The legal ramifications of this approach were not tested because the case did not go to trial. Pessimists playing Devil's advocate have suggested that the defense could counter that issue rather easily. Following that line of reasoning to its logical conclusion, they suggest looting saves the Government money by eliminating the need for an expensive protection or excavation effort. The notion is tantalizing and should be pursued by advocates concerned with the problem.

3. The concept of punitive damages also has been suggested as being applicable to the situation at hand. Punitive damages are awarded in cases in which payment is sought for intangibles in order to punish for deliberate acts known to be wrong. In a similar manner, it should be possible to evaluate and compensate for intangible deliberate damage to an archeological site. This approach has been suggested recently in the Southwest (Dee Green, personal communication) and has not yet been tested. It does offer interesting possibilities which should be investigated.

4. The archeological profession must develop criteria for evaluation of site worth that transcends dollar amounts. Educational, esthetic, scientific values all must be recognized, defined, and made known to the courts where guilt in such cases will be assessed and sentence passed. Archeologists have responsibility to develop criteria for evaluation to replace the dollar as a measure of the worth of archeological sites.

The case of Sheridan, Osman, and Holman has been widely publicized and hotly argued as the first case of this type in the region. It is hoped that, perhaps, the result can disuade others from pursuing arrowhead collection as a "harmless recreational activity," forcing them to recognize the destruction they are causing and the dangers they are facing.

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# APPENDIX I

## PUBLIC LAW 94-199

## TO ESTABLISH THE HELLS CANYON NATIONAL RECREATION AREA . . .

C O P Y

PUBLIC LAW 94-199
94th Congress, S. 322
December 31, 1975

AN ACT

To establish the Hells Canyon National Recreation Area in the States of Oregon and Idaho, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) to assure that the natural beauty, and historical and archeological values of the Hells Canyon area and the seventy-one-mile segment of the Snake River between Hells Canyon Dam and the Oregon-Washington border, together with portions of certain of its tributaries and adjacent lands, are preserved for this and future generations, and that the recreational and ecologic values and public enjoyment of the area are thereby enhanced, there is hereby established the Hells Canyon National Recreation Area.

APPENDIX II

CODE OF FEDERAL REGULATIONS

261.9(e)

261.9 Property

The following are prohibited . . .

"(e) Digging in, excavating, disturbing, injuring, or destroying any archaeological, paleontological, or historical site, or removing, disturbing, injuring, or destroying an archaeological, paleontological, or historical object."

APPENDIX III

TITLE 18, UNITED STATES CODE 641

THEFT OF GOVERNMENT PROPERTY

TITLE 18, UNITED STATES CODE 1361

MALICIOUS MISCHIEF

C O P Y

CHAPTER 31--EMBEZZLEMENT AND THEFT

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

CHAPTER 65--MALICIOUS MISCHIEF

§ 1361. Government property or contracts

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

# APPENDIX IV

## ESTIMATE OF ARTIFACT VALUE

BY
DAVID COLE

UNIVERSITY OF OREGON MUSEUM

EUGENE, OREGON

C O P Y

February 7, 1978

TO: U.S. Forest Service
Wallowa-Whitman National Forest
Post Office Box 907
Baker, Oregon 97814

FROM: David L. Cole
Curator of Anthropology

SUBJECT: Appraisal of Artifacts

The method that I used to appraise the 222 confiscated artifacts is the method that I have used at the Oregon State Museum of Anthropology since 1957. This is, to determine "fair market value," or, the amount of money that would be realized in a sellers market.

The appraisal is based upon the highest prices that could be realized from one or more of three kinds of sales:

1. Catalog sales. Catalogs nationally advertised in hobby magazines, etc.

2. Auctions. Both nationally advertised and local. My information on local auctions comes from talking to people who are or have been in the artifact auction business. So my information applies to prices that are paid in the Willamette Valley area. I am told that higher prices can be realized from auctions in the Eastern United States.

3. Over-the-counter sales. In some small "out of the way" restaurants and gasoline stations where most of the customers are tourists, artifacts and fragments are near the cash register where they are sold to souvenir collectors and children. Such places, as at Valley Falls or Wagontire on Highway 395, offer materials that would not be sold in catalogs or at auction as individual pieces.

This appraisal does not consider the value that collectors place upon their own collections or the amount for which the collector may insure a collection. Such values are consistently high, sometimes as much as 100 fold. It is recognized, nevertheless, that the amount of money that a collector will pay for an artifact is based entirely upon what he believes it to be worth, so such beliefs carry to the marketplace. Buyers with whom I have talked believe they are getting real

bargains. Collectors seldom are able to sell artifacts for as much as they believe them to be worth. The exceptions would be those situations where someone is buying collections to start a museum or to have displays in a place of business. Such people are apt to pay high prices for large showy collections. Occasionally someone who needs income tax deductions will pay high prices for a collection then turn it over to a museum such as the Oregon State Museum of Anthropology.

In over-the-counter sales to tourists, often a box or boxes of fragments will be placed near the cash register. As a rule, any fragment that is clearly man-made will sell for 50¢. If the artifact can be identified as a fragment of an "arrowhead" or knife the price will be 75¢, $1.00, or $1.25 depending upon percentage of completeness or the kind of stone.

Unbroken artifacts such as "perfect arrowheads" will be displayed in under-counter or behind-the-counter cases. Such artifacts are sold also, at auctions and through catalogs. Average pieces are apt to bring the highest individual prices through over-the-counter sales and somewhat less through catalog sales. As a rule such pieces will not be sold individually at auction, rather they will be sold in lots or mounted in a picture frame. The lowest local prices on unbroken "arrowheads" sold individually, are $2.00 each. The price rises according to four factors:

1. Quality of workmanship, in which the term "well made" often connotes either symmetry, skill of workmanship, or, more often, that the piece is esthetically pleasing.

2. Quality of the stone, where artifacts made of gem stones, or semi-precious stones, such as opal, carnelian, bloodstone, onyx, etc., will bring a higher price than dull, colorless stone. Gem quality fragments, especially those large enough to reshape, will bring a relatively high price.

3. Artifact type and rarity are considerations. Many "arrowheads" have common names that are understood by collectors, such as "Klickitat point," "Columbia River Gem point," "Rogue River point," etc. Many collectors would like to have specimens of every type in their collections, so the price may vary according to availability and demand.

4. Size is often a factor, with the larger specimens usually worth more, all other things being equal. Some catalog houses buy and sell specimens by the length.

Occasionally collectors will dig up specimens that are "well made," of quality stone and of a well known type. Such specimens are the treasures that sustain the "pothunting" activity. [pot=trophy]. Among the confiscated artifacts there were several specimens that would bring relatively higher prices at auction.

1. A small green point of the "Columbia River Gem point" type made of a bloodstone-like stone. This specimen is unusual because of its color. I would predict active bidding on this specimen at an auction, with a minimum price of $25.00. Counter sales might bring more, as would sale to a jeweler, to be made into a piece of jewelry.

2. A "leaf-shape" point with serrated edges, sometimes called a "Cascade Point" in archaeological literature, is fairly rare, of the period around 5000-4000 B.C. This specimen, because it is in good condition and made of good quality chalcedony, could be sold for at least $15.00.

3. Several unbroken points made of good quality chalcedonic stone are of the "Klickitat" and "Columbia River Gem point" types. Currently such types sell for $5.00 to $7.50 at auction.

4. Unbroken points made of lusterless stones, but of recognizable types will sell for $2.50 to $5.00, depending upon size and shape.

All of the prices indicated above are amounts that could be realized by selling the pieces individually over whatever period of time is necessary to dispose of them. Some specimens could be sold immediately. Others, such as the fragments, might be sold in one or two tourist seasons.

Group #1

5 bone pieces - no value

Group #2

3 bone pieces - no value

Group #3

2 teeth (animal) - no value

## Group #4

| | |
|---|---|
| 9 tips and pieces, including 4-2, 4-9, 4-11 | $ 4.50 |
| 4-7, 4-5, 4-8, 4-10 | 3.00 |
| 4-3 | 1.00 |
| 4-4 | 1.00 |
| 4-12 | 1.00 |
| 4-13 | 1.00 |
| 4-14 | 1.00 |
| 4-15 | 1.00 |
| 4-1 | 1.50 |
| 4-16 | 1.50 |
| Total Group #4 | $16.50 |

## Group #5

| | |
|---|---|
| 5-12 | $ .50 |
| 5-1 | 1.50 |
| 5-5 | 1.50 |
| 5-6 | 1.50 |
| 5-9 | 1.50 |
| 5-15 | 1.50 |
| 5-17 | 1.50 |
| 5-2 | 2.00 |
| 5-3 | 2.00 |
| 5-8 | 2.00 |
| 5-11 | 2.00 |
| 5-13 | 2.00 |
| 5-14 | 2.00 |
| 5-16 | 2.00 |
| 5-7 | 3.00 |
| 5-4 | 7.50 |
| 5-18 | 7.50 |
| 5-10 Cascade | 15.00 |
| Total Group #5 | $56.50 |

## Group #6

| | |
|---|---|
| 6-2 | $ .50 |
| 6-6 | .50 |
| 6-3 | .75 |
| 6-1 | 1.00 |
| 6-4 | 2.00 |
| 6-5 Bloodstone | 25.00 |
| Total Group #6 | $29.75 |

## Group #7

| | |
|---|---|
| 7 points, each $1 | $ 7.00 |
| Total Group #7 | $ 7.00 |

## Group #8

| | |
|---|---|
| 10 tips and pieces | $ 5.00 |
| 4 points | 3.00 |
| 3 points | 3.00 |
| Total Group #8 | $11.00 |

## Group #9

| | |
|---|---|
| 25 tips and pieces @ 50 cents each | $12.50 |
| 15 broken points @ 75 cents each | 11.25 |
| 9-5 | 1.00 |
| 9-11 | 1.00 |
| 9-13 | 1.00 |
| 9-15 | 1.00 |
| 9-18 | 1.00 |
| 9-19 | 1.00 |
| 9-28 | 1.00 |
| 9-30 | 1.00 |
| 9-33 | 1.00 |
| 9-12 | 1.25 |
| 9-14 | 1.25 |
| 9-20 | 1.25 |
| 9-23 | 1.25 |
| 9-26 | 1.25 |
| 9-27 | 1.25 |
| 9-21 | 1.50 |
| Total Group #9 | $41.75 |

## Group #10

| | |
|---|---|
| 4 tips and pieces | $ 2.00 |
| 12 Chips | 4.00 |
| 10-4, 10-7, 10-12, Unnumbered | 3.00 |
| 10-6, 10-9, 10-11 | 3.00 |
| 10-8, 10-2, 10-10 | 4.00 |
| 10-1, 10-5 | 4.00 |
| Total Group #10 | $20.00 |

Group #12

| | | |
|---|---|---|
| 12-14 | | $ .75 |
| 12-37 | | .75 |
| 12-8 | | 1.00 |
| 12-12 | | 1.00 |
| 12-15 | | 1.00 |
| 12-17 | | 1.00 |
| 12-18 | | 1.00 |
| 12-26 | Cascade | 1.00 |
| 12-27 | | 1.00 |
| 12-28 | | 1.00 |
| 12-30 | | 1.00 |
| 12-41 | | 1.00 |
| 12-2 | | 2.00 |
| 12-5 | | 2.00 |
| 12-7 | | 2.00 |
| 12-16 | | 2.00 |
| 12-19 | | 2.00 |
| 12-21 | Desert Side Notch | 2.00 |
| 12-23 | | 2.00 |
| 12-25 | | 2.00 |
| 12-31 | | 2.00 |
| 12-36 | | 2.00 |
| 12-39 | | 2.00 |
| 12-40 | | 2.00 |
| 12-3 | | 2.50 |
| 12-6 | | 2.50 |
| 12-10 | | 2.50 |
| 12-34 | | 2.50 |
| 12-1 | | 3.00 |
| 12-9 | | 3.00 |
| 12-11 | | 3.00 |
| 12-29 | | 3.00 |
| 12-13 | | 4.00 |
| 12-20 | | 4.00 |
| 12-22 | | 4.00 |
| 12-24 | | 4.00 |
| 12-32 | | 4.00 |
| 12-33 | | 4.00 |
| 12-38 | | 4.00 |
| 12-42 | | 4.00 |
| 12-4 | | 5.00 |
| 12-35 | | 5.00 |
| | Total Group #12 | $99.50 |
| | GRAND TOTAL ALL GROUPS | $282.00 |

APPRAISED BY: (signed)

DAVID L. COLE
Curator of Anthropology
University of Oregon

Appraisal made January 26, 1978, at Wallowa-Whitman National Forest Headquarters, Baker, Oregon.

APPENDIX V

INDICTMENT IN THE CASE OF

UNITED STATES OF AMERICA

vs.

STEPHEN SHERIDAN

DAVID OSMAN

JUDITH HOLMAN

C O P Y

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | NO. CR 78-_____ |
| | ) | |
| STEPHEN SHERIDAN, | ) | I N D I C T M E N T |
| DAVID OSMAN AND | ) | |
| JUDITH HOLMAN, | ) | [18 U.S.C. 1361, 641 & 2] |
| | ) | |
| Defendants. | ) | |

THE GRAND JURY CHARGES:

COUNT I

On or about January 9, 1976, in the District of Oregon, STEPHEN SHERIDAN, DAVID OSMAN and JUDITH HOLMAN, defendants herein, did wilfully and knowingly injure and depredate property of the United States, to-wit: an archaeological site in the Hell's Canyon National Recreation Area, causing damage in excess of $100; in violation of Title 18, United States Code, Sections 1361 and 2.

COUNT II

On or about January 10, 1976, in the District of Oregon, STEPHEN SHERIDAN, DAVID OSMAN and JUDITH HOLMAN, defendants herein, did wilfully and knowingly embezzle, steal, purloin, and convert to his/her own use a thing of value of the United States, to-wit: 222 archaeological objects including projectile points and bone fragments of a value in excess of $100; in violation of Title 18, United States Code, Sections 641 and 2.

DATED this _____ day of April, 1978.

A TRUE BILL.

_____
FOREMAN

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/s/Kristine Olson Rogers
KRISTINE OLSON ROGERS
Assistant United States Attorney

# "POTHUNTING ON NATIONAL FOREST LANDS IN ARIZONA: AN OVERVIEW OF THE CURRENT SITUATION

by

Martin E. McAllister

## Introduction

Vandalism to archeological sites on National Forest lands in Arizona has become a serious problem. The problem has been compounded by recent court decisions which make it difficult to prosecute those engaged in this activity. This document presents an overview of these cultural resources, the type of depredation they are being subjected to, and the current status of efforts to prosecute those involved.

There are over 6,000 recorded archeological sites on National Forest lands in Arizona and the total number of sites present may exceed 385,000. (The term "archeological site" refers to the remains of past human behavior and includes both prehistoric and historic sites. These sites are also referred to as "cultural resources.") Figure 1 presents a breakdown of sites recorded and total numbers of sites estimated to be present for each National Forest in Arizona. (This information was obtained from the Forest Archeologist for each Forest, except for the Prescott National Forest, it was obtained from the Recreation and Lands Staff.) These sites range in type from scatters of prehistoric or historic artifacts to large prehistoric habitation sites and major historic sites.

This information provides an extremely brief overview of the nature and magnitude of cultural resources on National Forest lands in Arizona. The other critical quality of these resources is their importance. The people of the United States, through their elected representatives in Congress, have long recognized the value of archeological sites on Federal lands. Beginning with the Antiquities Act of 1906, the result of this recognition has been the development of a number of Federal laws, regulations, policies, and procedures which apply to these resources. The basic thrust of these measures has been the principle that prehistoric and historic sites on Federal lands constitute the cultural heritage of the Nation and that, as such, the sites themselves, or at least the information they contain, should be protected from destruction. Specific recognition of the importance of sites on National Forest lands in Arizona has come in several ways.

Ten sites on these lands are included in the National Register of Historic Places and three of the ten have received special recognition as National Historic Landmarks. In addition, approximately 100 other sites on the Forests are currently under consideration for nomination to the National Register, either individually or as components of districts or multiple resource areas.

Figure 1

NATIONAL FORESTS IN ARIZONA

| | Apache-Sitgreaves | Coconino | Coronado | Kaibab | Prescott | Tonto | Total |
|---|---|---|---|---|---|---|---|
| Sites recorded to date | 544-1,000 | 2,591 | 748 | 570 | 400-500 | 1,344 | 6,197-6,753 |
| Projected total no. of sites on Forest | 30,000 to 50,000 | 80,000 | 20,000 to 30,000 | 45,000 | 40,000 to 50,000 | 125,000 to 130,000 | 340,000 to 385,000 |
| Estimated percentage of sites pothunted | 60% | 75-80% | 60-70% | 10% | 20-30% | 60-70% | 50% (AVG.) |

The scientific importance of these sites is also recognized. There are currently more than 50 archeological research projects in progress on National Forest lands in Arizona, either as a result of mitigation requirements or for strictly scientific purposes. These projects are carried out either by Forest Service archeologists or by institutions holding Forest Service antiquities permits in accordance with Federal regulations. All materials recovered are stored in designated Federal repositories, where they are available for both public enjoyment and further scientific study by professional archeologists.

The public appreciation value of archeological sites has also been recognized by the Forest Service. Interpretive development is currently being planned or is under consideration for a number of sites on National Forest lands in Arizona. Public use and enjoyment of interpretive sites on National Park Service lands in Arizona provides an indication of the level of success of such programs. For example, last year alone, Tonto National Monument had almost 70,000 visitors, even though it has only one small cliff dwelling open for public visitation.

Unfortunately, sites on National Forest lands in Arizona are also recognized by individuals who engage in site vandalism or "pothunting" as it is more commonly known. Figure 1 also presents figures for the estimated percentage of sites on each Forest which already have been subjected to this destructive activity. Of these, many have been totally destroyed or so badly damaged that their cultural heritage value, both for public appreciation and science, has been irretrievably impaired.

The problem is not simply one of recreation users stumbling onto sites and picking up a few objects, not realizing what they are doing or that it is prohibited. What is occurring is systematic looting of sites for commercial purposes by individuals who are fully aware of the impacts and illegality of their acts. The validity of this claim is substantiated not only by the magnitude of the destruction, but also by evidence of the types of tools, equipment, and methods employed.

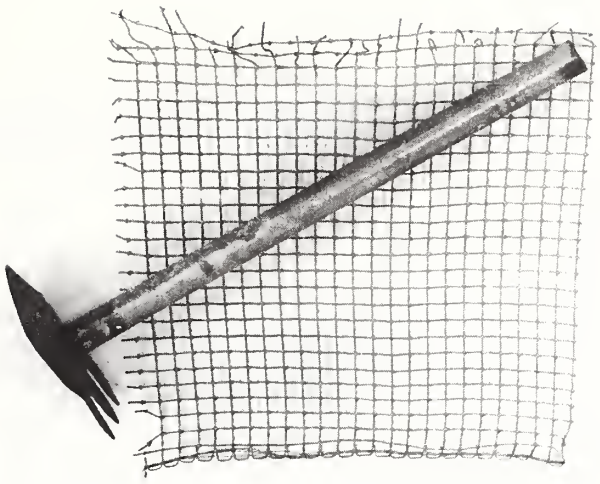
The following types of specialized pothunting tools have been confiscated recently on the Tonto National Forest in unrelated incidents and locations (Figure 2).

1. Large and small probes apparently designed for use in locating burials (these tools have been reported throughout Arizona and New Mexico and may be manufactured and sold to pothunters by one or more sources).

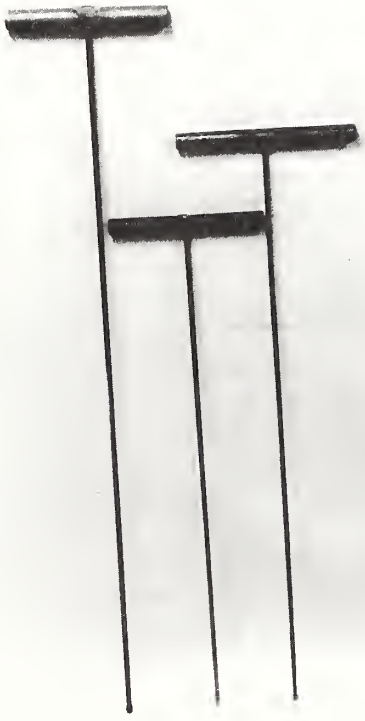
A

B

Figure 2 -- A. Probe, screwdrivers and bent end or hook screwdrivers used in pothunting on the Tonto National Forest. B. Other tools recovered from illegal digging.



C



D

Figure 2 (continued) -- C. Screen and garden tools used in illegal digging on the Tonto National Forest. D. Depth or burial probes recovered from pothunting activities.

2. Specially designed and made "sharpshooter" or posthole type shovels, probably designed for use in gaining quick access to burials and other artifact deposits.

3. Modified (bent end) screwdriver digging tools.

One individual apprehended recently on the Tonto National Forest was found to have a set of tools in his possession which corresponded closely to the specialized excavation or digging kits used by professional archeologists, including such items as trowels, dental tools, brushes, etc. Types of specialized equipment other than hand tools either reported or suspected to be in use by pothunters include four-wheel drive vehicles, boats, airplanes, helicopters, mechanized excavation equipment (such as backhoes and bulldozers), and two-way radio and scanner systems. Although not designed specifically for this purpose, the potential aid to pothunters provided by equipment of this type is obvious.

These types of tools and equipment are suggestive of the sophisticated methods in use by pothunters. Techniques either reported or suspected to be in use include the following types of activities which facilitate artifact removal and/or reduce the risk of being apprehended.

1. Use of probes to quickly locate burials and artifact deposits, followed by the use of "sharpshooter" shovels to determine rapidly if the deposit is rich enough to merit digging with conventional hand tools.

2. Use of mechanized equipment to quickly expose large areas of a site.

3. Use of camouflage devices, such as bottomless tents, to conceal digging activities.

4. Work at night using lights in exposed, nonremote areas.

5. Use of aircraft (airplanes or helicopters) to locate sites, sometimes with radio contact with four-wheel drive vehicles on the ground.

6. Use of helicopters to locate and then land at sites to be potted.

7. Use of boats to gain access to sites in shorefront areas.

8. Use of two-way radios for communication purposes and to provide an early warning from lookouts to avoid apprehension.

9. Use of radio scanners to determine the location of law enforcement personnel.

In addition, it has also been reported that special maps showing locations of rich and unprotected sites circulate among pothunters. There are undoubtedly other sophisticated methods of this type in use by pothunters, but those listed here should provide an indication of the purposeful nature of their activities.

The types of tools, equipment, and methods used by this category of pothunter also indicates that these individuals are not merely casual artifact collectors engaged in obtaining a few objects for their own personal gratification. The investment of time, money, and effort required suggests that a monetary return is expected and that these are, in fact, commercial pothunters.

Further evidence of this is provided by the fact that there are many stores in the Southwest and other parts of the country which deal in prehistoric and historic artifacts. Although a percentage of the material sold in these stores may have been obtained legally by pothunters (from private land they own or with the permission of the owner), it is also undoubtedly the case that much of it was taken illegally from Federal or State lands. Since it is not illegal to deal in artifacts, the purchasers of this material probably do not care how it was obtained.

Some of these dealers are even so brazen as to send out advertising literature on their activities. Dr. Emil Haury of the University of Arizona recently reported that he had obtained a copy of a catalog from the East Coast in which even sherds from Southwestern pots were advertised for sale.

Some dealers are known to engage in pothunting to obtain material for sale. More often, pothunters sell to dealers or perhaps to middlemen. In a recent case on the Tonto National Forest, sherds from certain reconstructable vessels were found already sorted and bagged with tags identifying their contents. This would have facilitated transfer of this material to a dealer or middleman and is certainly indicative of a commercial rather than casual interest.

Why do commercial potnunters risk apprehension for digging illegally and invest their time and money to do this? The answer must be that they expect to make substantial profits and, in fact, current market prices for certain categories of artifacts indicate that they do. Depending on size and condition, decorated prehistoric pots of the Hohokam, Anasazi, Salado, and Mimbres cultures may sell for as much as several thousand dollars apiece and it is conceivable that a number of pots of this quality could be removed from a single site in a very short time. The profit potential of this activity is also indicated by expert appraisal values for the artifacts recovered in several recent pothunting cases on National Forests in Arizona and New Mexico: $1,217, $2,706, and $3,975. These figures, in and of themselves, may not seem exceedingly high. However, it must be remembered that they are for materials taken from individual locations on one or a few occasions. When this activity is engaged in over a long period of time at many sites, the potential for profit is extremely high. Various long term commercial pothunters in Arizona and New Mexico are reported to have sold accumulated collections for figures as high as several hundred thousand dollars.

Given the obvious profit motive for commercial pothunting, it can be predicted that this activity will continue in the future, and probably at an accelerated pace, as more and more individuals become aware of the money to be made. This is a particularly unfortunate situation which is quickly reaching crisis proportions.

The plain fact is that commercial pothunters destroy the other non-monetary values which these sites have. Obviously, the public appreciation values of a site are lost when holes and trenches have been dug haphazardly throughout the area, scattering artifactual and skeletal material over the surface, destroying or damaging any architectural features which might have been present, and often making the site unsafe for entrance. Also, since pothunters are interested in objects and not information, they destroy the contextual relationships of the objects and, thus, the critical element in the scientific value of the site.

If there were an unlimited number of prehistoric and historic sites, these losses might not be deemed so significant. However, the fact remains that there is only a finite and nonrenewable number of sites for these past time periods. If destruction by commercial pothunters continues at the present or an accelerated rate, one can predict a situation in the not too distant future when there simply will be no more existing evidence of these periods except for collections stored in museums and a few sites preserved as National Parks and Monuments.

How can Federal agencies prevent this loss? Until recently the answer to this question would have been to prosecute those apprehended under the penalty provisions of the Antiquities Act of 1906 (Public Law 59-206). However, in a decision on the 1974 Diaz case, the Ninth Circuit Court of Appeals (Ninth Judicial Circuit: Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington) ruled the Act unconstitutionally vague. The details of this case are discussed in the excellent article by Robert Collins and Dee Green recently published in SCIENCE (1978). There have already been at least two instances in Arizona in which Federal attorneys have refused to prosecute pothunters under the Antiquities Act because of the Diaz ruling.

Unfortunately, among the Federal statutes concerned with cultural resources, the Antiquities Act is the only law which enables Federal agencies to seek prosecution for site vandalism. Moreover, Department of the Interior regulations establishing procedures for this action (25 CFR 132 and 43 CFR 3) have the Act as their direct authority. Only the Forest Service has regulations not based on the Antiquities Act which allow prosecution for pothunting. Thus, the situation is that Federal agencies in the Department of the Interior have only the Antiquities Act as a specific basis on which to prosecute pothunters and the Forest Service authority is at the regulation level only. The arguments for the Forest Service regulations applying other than through the Antiquities Act have been cogently presented by Robert Bates (Appendix I).

Even if the constitutionality of the Antiquities Act had never been questioned, it can be argued that it has another critical flaw, given current conditions:

> In 1906 Congress could not have anticipated the lucrative market in prehistoric artifacts that exists today. In light of the commercial values attached to artifacts, especially pottery, a fine of $500 for a violation of the Act is a in effect business expense. (Collins and Green, 1978:1058.)

Thus, the $500 fine, which probably seemed substantial in terms of the economy of 1906, now has become virtually meaningless. Also, unfortunately, there is only one case of record (the Smyer-May case, see Collins and Green 1978) in which individuals have been sentenced under the incarceration provision of the Act (90 days in jail, in addition to or as an alternative to the fine) and this case is currently under appeal. The situation is the same with the Forest Service regulations. The maximum penalty allowable is a $500 fine and/or 6 months in jail.

This situation existed when an antiquities case began to develop on the Tonto National Forest in December 1977. The circumstances of this case were significant, both in terms of the large amount of destruction caused and a substantial quantity of potentially incriminating evidence against the defendants. Given these circumstances and the status of the Antiquities Act, the decision was made to prosecute these individuals under 18 USC 641 (Embezzlement and Theft, Public money, property or records) and 18 USC 1361 (Malicious Mischief, Government property or contracts), generally referred to as theft of Government property and destruction of Government property.

At the time, this appeared to be a very viable strategy for prosection, not only because it avoided the difficulties associated with the Antiquities Act, but also because these statutes provide for penalties more in keeping with the seriousness of commercial pothunting (felony convictions and penalities up to a $10,000 fine and/or 10 years in jail). The contention that these individuals were engaged in commercial pothunting, and should receive penalties of this magnitude for their alleged acts, was based primarily on four aspects of the case:

1. The degree of destruction at the site.
2. The value of the artifacts taken.
3. The treatment of some of the artifacts taken (already sorted in bags with tags identifying their contents).
4. The fact that one of the individuals had prior conviction for this type of activity.

The only difficulty foreseen with the case was the problem of establishing that sites and artifacts on Federal lands are, in fact, Government property. Unfortunately, research has shown that there is no specific statement to this effect in the relevant Federal laws and regulations. However, it was felt that this could be established on the basis of common law principles, especially since access to the area was marked with a Forest property boundary sign and a Forest Service antiquities sign was posted at the site itself.

Both agency personnel and the U. S. Attorney's Office were optimistic that a successful prosecution could be obtained. However, on April 12, 1978, Judge William A. Copple issued an ORDER granting a defense motion to dismiss and dismissing the indictment with prejudice (Appendix II).

According to the ORDER, the primary basis for the ruling was the issue of the applicability of the theft and destruction statutes, given the existence of the Antiquities Act. Judge Copple concluded that the nature of the three statutes indicated that the appropriate indictment

would have been under the Antiquities Act and it was for this reason that he dismissed the charges under theft and destruction. At the same time, he took note of the Diaz decision and indicated that prosecution under the Antiquities Act was also not feasible.

Prior to this ruling, it was assumed that there was still a viable means for prosecution of individuals engaged in this activity. However, if this decision stands, it will mean that there is no statutory basis for prosecution and that the only legal basis for protection of archeological sites on Federal lands in the vast Ninth Judicial Circuit would be the Forest Service regulations which apply only to National Forest lands. This situation was publicized almost immediately in the news media (Figure 3) and there can be no doubt that commercial and potential commercial pothunters became aware of it rapidly.

Although the seriousness of this situation may not, as yet, be recognized by all concerned, it is potentially very grave. Except on the National Forests, it is conceivable that pothunters could go to archeological sites on Federal lands, including those in National Parks and Monuments, and openly remove artifacts, even in full view of Federal officers. The resultant potential for large-scale loss of irreplaceable cultural resources on Federal lands in the Ninth Judicial Circuit is obvious and will be realized quickly unless action is taken.

Given the current legal status of the Antiquities Act in this Circuit, as well as the outmoded penalties it provides for, the Forest Service and other Federal agencies must have some other means by which to prosecute commercial pothunters. Ultimately, the Antiquities Act should be replaced or amended to create a more workable and stringent law. In the meantime, Judge Copple's decision is on appeal to the Ninth Circuit Court of Appeals which, hopefully, will overturn his ruling.

## References

Collins, Robert B. and Dee F. Green
1978 A Proposal to Modernize the American Antiquities Act. Science, Volume 22, pp. 1055-1059.

## Appendix I

### THE BASIS FOR THE REGULATIONS of the SECRETARY OF AGRICULTURE

The first forest reserves were established under the provisions of the Creative Act of March 3, 1891 (26 Stat. 1103; 16 U.S.C. 471), which has since been repealed and replaced by the Organic Act.

The Organic Administration Act of June 4, 1897 established the national forests as they are known today. They were first called forest reserves until the designation was changed to national forests by the Act of March 4, 1907 (34 Stat. 1296). At first the forests were administered by the Secretary of the Interior but the Transfer Act of February 1, 1905 (33 Stat. 628, 16 U.S.C. 472) placed jurisdiction with the Secretary of Agriculture and gave the Secretary authority to "execute or cause to be executed" all laws affecting the national forests.

The Act of June 4, 1897, as amended (30 Stat. 35; 16 U.S.C. 551) is the basic authority of the Secretary of Agriculture to issue rules and regulations governing the occupancy and use of the national forests. Section 551 is as follows:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of the Act of March 3, 1891, as amended, and which may be continued; and he may make such rules and regulations and establish such service as will ensure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. (Emphasis added.) In furtherance of the authority granted by the Congress to make provisions against depredations upon the forests the Secretary has from time to time issued or modified regulations. Regulations affecting the Forest Service are codified in Chapter II of Title 36 Code of Federal Regulations. There are two Parts that pertain to occupancy and use. Part 251 contains regulations applying to the issuance of special use permits, leases, and easements for various purposes, including archeological permits. Part 261 contains the so-called

"prohibitions" that is, prohibitions that apply when acts or omissions occur on the Forests, when there are acts or omissions that somehow threatens or endangers United States property administered by the Forest Service, or threatens or endangers persons using, or engaged in the protection, improvement or administration of the National Forest System or a Forest road.

Thus in 36 CFR 261.9(e) there has been published (#2 F.R. 2957, January 14, 1977, as amended by 42 F.R. 24739, May 16, 1977) prohibition against "digging in, excavating, disturbing, injuring, or destroying an archeological, paleontological, or historical site, or "removing, disturbing, injuring, or destroying an archeological, paleontological, or historical object."

This regulation was issued by the Secretary under his authority to prevent depredations and regulate occupancy and use and is not dependent on the Antiquities Act (16 U.S.C. 433). Note that down through the years there have been numerous tests of the Secretary's authority to issue such regulations. The regulations have been held valid many times. (See Notes of Decisions following Section 551 in Title 16.)

* * * * * *

The Secretary's general authority was derived from and was delegated to the Forest Service according to the following:

- 7 U.S.C. 2201, 2202, 2204 - Department of Agriculture Organic Act. General authority of Secretary.
- 5 U.S.C. 301. General authority of the Secretary to prescribe regulations governing the work of the Department.
- Reorganization Plan No. 2 of 1953. General authority to make delegations.
- 7 CFR 2.7. General delegations of Secretary's authority.

- 7 CFR 2.19(d). Delegations of authority to the Assistant Secretary for Conservation, Research, and Education as related to the Forest Service.

- 7 CFR 2.60. Delegation by the Assistant Secretary to the Chief of the Forest Service.

- 33 F.R. 8552. Delegations of Authority by the Chief to the Associate Chief, Associate Deputy Chiefs, and Deputy Chiefs.

- FSM 1230. Delegations of Authority by way of the Forest Service Directive System (see 36 CFR 200.4). Line Officers (Regional Foresters, Forest Supervisors, and District Rangers) are delegated authority to enforce laws and regulations within their areas of jurisdiction.

- In the area of trespass and law enforcement there are additional assignments of responsibility in the trespass manual, Title 5300.

- Act of March 3, 1905 (33 Stat. 873, as amended; 16 U.S.C. 559) provides that all persons employed in the Forest Service shall have authority to make arrests for the violation of the laws and regulations relating to the national forests.

C O P Y

## Appendix II

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. CR-78-29 Phx. WPC

### MEMORANDUM AND ORDER

On December 22, 1977, the defendants allegedly were seen digging within Indian ruins located on the Tonto National Forest. They were arrested by Forest Service officers, and charged with the theft and destruction of Indian relics. Count One of the indictment alleges that the defendants stole government property valued in excess of $100. 18 U.S.C. § 641. The government property consists of clay pots, bone awls, stone matates, and other Indian artifacts located at the ruins. Count Two alleges depredation of government property, the Indian ruins located within the national forest. 18 U.S.C. § 1361. Conviction on either count can lead to a fine not more than $10,000, or imprisonment for not more than ten years, or both.

The alleged conduct, if true, also violates the Antiquities Act of 1906, which states:

> Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Act of June 8, 1906, 34 Stat. 225 (codified at 16 U.S.C. § 433). This action raises the issue whether the government can choose to prosecute under either the theft and malicious mischief statutes, 18 U.S.C. §§ 641 and 1361, or the Antiquities Act. The resolution of this question affects more than the range of penalties that can be imposed upon the defendants.

In United States v. Diaz, 499 F2d 113 (9th Cir. 1974), the Court of Appeals held that the penal provision of the Antiquities Act was fatally vague in violation of the due process clause of the Constitution. Therefore, if the government cannot elect to prosecute under the theft and malicious mischief statutes, rather than the Antiquities Act, then this action must be dismissed.

In the United States v. Castillo-Felix, the Court of Appeals stated "the general rule that, where an act violates more than one statute, the Government may elect to prosecute under either unless the congressional history indicates that Congress intended to disallow the use of the more general statute." 539 F.2d 9, 14 (9th Cir. 1976). The analysis required is demonstrated by Kneiss v. United States, 413 F.2d 752 (9th Cir. 1969). In Kneiss, the defendant had passed a series of bogus postal orders in several states. He was indicted for having unlawfully passed counterfeit "securities," 18 U.S.C. § 472, and for unlawfully passing forged "postal money orders." 18 U.S.C. § 500. The defendant was convicted upon a plea of guilty and sentenced upon each count. The defendant then moved to vacate his sentences under 18 U.S.C. § 472. The Court of Appeals granted the motion. "The government's argument in support of Kneiss' indictment, conviction, and sentence under section 472 rests upon one theory: If a single act violates two statutes, the Government may elect to prosecute under either one. . . . [O]ur review of the relevant legislative history convinces us that this interpretation would be improper. . . ." Id. at 753-54. The Court of Appeals concluded that a bogus postal money order was not a counterfeit "security" under section 472.

> It is all too obvious that reasonable interpretation often cannot depend upon a process of careful literalism. Words, phrases, and sentences of particular statutes derive their meaning from their particular contexts. This is the case here. The historical developments of the two statutes, despite the Government's fine literalism to the contrary, persuades us that section 472 does not govern money order fraud.
>
> All of the foregoing leads to the conclusion that Congress has consistently treated money order forgery as a distinct crime. The most salient feature of this separate treatment is the fact that money order forgery has always been controlled by legislation specifying less severe penalties for money order fraud than those prescribed for fraud relating to other Government securities.

Id. at 754-59.

When the Antiquities Act was promulgated in 1906, it was meant to protect historic ruins and monuments on public lands from destruction "by parties who are gathering them as relics and for the use of museums and colleges." S. Rep. No. 3797, 59th Cong., 1st Sess. (1906); see also H. R. Rep. No. 2224, 59th Cong., 1st Sess. (1906). The Act authorized the President to declare by proclamation national monuments and reserve lands for their preservation, allowed permits for the examination and excavation of ruins, and put teeth into the permit requirement by imposing a fine or imprisonment for failure to comply. Act of June 8, 1906, 34 Stat. 225 (codified at 16 U.S.C. §§ 431 to 433). These provisions set out a comprehensive "method for protecting remains that are still upon the public domain or in Indian reservations." H. R. Rep. No. 224, 59th Cong., 1st Sess. (1906).

The present theft and malicious mischief statutes, 18 U.S.C. §§ 641 and 1361, are consolidations of criminal statutes originating in the Act of March 4, 1909, ch. 321 §§ 35, 36, 47, 48, 35 Stat. 1095, 1096-98, and subsequently amended. See H. R. Rep. No. 304, 80th Cong., 1st Sess. at A54, A100 (1947). Neither party addresses whether any of these earlier statutes, passed within three years of the Antiquities Act, apply to the digging and excavation of Indian artifacts. Sections 35 and 36 of the Act of March 4, 1909, 35 Stat. 1095-96, prohibited the making of false claims against the government and the theft of military property. Sections 47 and 48 of the Act of March 4, 1909, 35 Stat. 1097-98, prohibited the theft of government property and punished receivers of stolen property. Only section 47 could arguably apply to the conduct alleged in this action:

> Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Section 47 differs little, however, from the theft statute existing when the Antiquities Act was passed in 1906. See Act of March 3, 1875, 18 Stat. 479 ("any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be guilty of a felony. . ."). The 1875 theft statute also imposed a harsh punishment of up to five years imprisonment and a fine of $5,000. Presumably, when Congress promulgated the Antiquities Act in 1906, Congress either assumed that historic ruins and Indian artifacts were not "property" protected by the theft statutes, or concluded that five years imprisonment was too harsh a punishment for excavating Indian relics. There is nothing within the text of the Act of March 4, 1909, that indicates that Congress changed its mind three years later.

Section 35 of the Act of March 4, 1909, 35 Stat. 1095, originally punished the making of false claims against the government. In 1918, section 35 was amended, in part, to prohibit the purloining of "any personal property" of the government, and to increase the penalty to a fine not more that $10,000 and imprisonment not more than ten years. Act of Oct. 23, 1918, 40 Stat. 1015. In 1934, section 35 was expanded to penalize anyone who wilfully injures "any property" of the United States. Act of June 18, 1934, 48 Stat. 996. A letter from the Attorney General, incorporated into the House and Senate reports, explained the amendment.

> The bill proposes to amend section 35 of the Criminal Code so as to prohibit injury to and depredations against Government property wherever situated. Present law provides a penalty for the theft of Government property, but there are no Federal statutes under which prosecutions may be had for willful injury to property of the United States. The need for such legislation has arisen in the work of several departments of the Government. Airway beacons . . . have been installed upon leased lands and there are reports of considerable difficulty by reason of depredations committed at these beacons. A water supply line . . . has also suffered from vandalism . . . . Another occasion when the need for legislation of this nature was felt, was when the U.S.S. Akron was under construction for the Navy Department at Akron, Ohio. Acts of syndicalism were committed on the ship, which, if not discovered, might have caused a serious disaster.

S. Rep. No. 1202, 73d Cong., 2d Sess. (1934); H. R. Rep. No. 1463, 73d Cong., 2d Sess. (1934). Finally, section 35 was amended in 1938 to allow a graduation in penalities depending upon the value of the property stolen or injured. Act of April 4, 1938, 52 Stat. 197; S. Rep. No. 1497, 75th Cong., 3d Sess. (1938); cf. Act of Nov. 22, 1943, 54 Stat. 591; S. Rep. No. 505, 78th Cong., 1st Sess. (1943), reprinted at 1943 U. S. Code Cong. Serv. 2.275. The Court concludes that amended section 35 does not extend beyond property already protected by the theft prohibition of section 47; and, section 47 does not apply to Indian artifacts regulated by the Antiquities Act.

A colorable argument can be made that differences between the Antiquities Act and the theft and malicious mischief statutes evidence a legislative intent to allow prosection under either. For example, 18 U.S.C. § 1361 prohibits "willful" injury to government property. The statutory requirement of willfulness requires the accused to act intentionally, "with knowledge that he was breaking the statute." United States v. Berrigan, 417 F.2d 1002, 1004 (4th Cir. 1969) cert. denied 397 U.S. 910, (1970). 18 U.S.C. § 641 prohibits theft of

government property. Theft requires an "intent to appropriate [property] . . . to a use inconsistent with the owner's rights and benefits." Ailsworth v. United States, 448 F.2d 439, 442 (9th Cir. 1971); see Morissette v. United States, 342 U.S. 246 (1952). The Antiquities Act can be read to impose a lesser punishment upon a person whose guilty knowledge does not fall within the theft and malicious mischief statutes. The Court will not draw these conclusions, however.

> Inferences as to possible legislative intent drawn from such variations in statutory terminology are of questionable validity. The phrases employed by one legislative draftsman are an unreliable clue as to that which another writer, at a different point in time, but seeking similar results, may have intended by the use of slightly different terms.

Kneiss v. United States, supra at 754. In 1906, the Antiquities Act was conceived as a comprehensive plan to deal with the preservation of ruins on the public lands. See H. R. Rep. No. 2224, 59th Cong., 1st Sess. at 2-8 (memorandum concerning the historic ruins of Arizona, New Mexico, Colorado, and Utah, and their preservation). Indeed, the departments of government have promulgated rules and regulations, consistent with the intent of Congress, to preserve American antiquities. See 25 C.F.R. pt. 132 (1977); 36 C.F.R. § 261.9 (1977); 43 C.F.R. pt. 3 (1976). The Antiquities Act is thereby the exclusive means by which the government could prosecute the conduct alleged in this action. The holding in Diaz, supra, leaves a hiatus which the Congress should correct by appropriate legislation.

IT IS ORDERED:

The motion to dismiss is granted and the indictment herein is dismissed with prejudice as to all defendants.

DATED April 12, 1978.

/s/ William A. Copple
United States District Judge

# ANTIQUITIES PROSECUTIONS IN NEW MEXICO: THE POST DIAZ SUCCESS

by

Dee F. Green

## Introduction

Subsequent to the Diaz decision of 1974, which held that the 1906 Antiquities Act was unconstitutionaly vague, an opinion by the Solicitor's Office of the Department of Interior suggested that prosecution under the Act could still occur. The rational for this opinion was based on the precedent set by United States vs. National Dairy Products Corp., (372 U.S. 29(1963)) in which it was held that a case must be judged on its merits. Since in the Diaz case the artifacts in question were only a few years old it did not follow that a case in which the artifacts themselves were truly old could be construed to fall under the Diaz ruling.

Diaz was confused by the testimony of Keith Basso who attempted to establish the notion of antiquity by arguing that since the ceremonial use to which the artifacts were put was an old ceremony the artifacts themselves could be considered old. Thus, in Diaz the issue of age rested not with the objects themselves but with the use to which the objects were put. Objects from an archeological context which was clearly old would, therefore, present a different set of facts for consideration of the age question, hence an additional testing of the Antiquities Act on this different set of facts seemed called for.

The opportunity to test the Diaz decision based on archeological facts arose three times in the state of New Mexico in rather rapid succession between October 1975 and October 1977. The Quarrell-Quarrell, Camazine, and Smyer-May cases all provided opportunities for testing the Diaz decision and in each case Diaz became one of the issues raised by defense counsel. A brief review of each has been provided in Collins and Green (1978) where space limitations prevented a detailed exposition. Here we will review the Quarrell-Quarrell and Smyer-May cases furnishing additional details based inpart on our participation in the events.

An additional factor influencing the New Mexico situation is that New Mexico falls under the jurisdiction of the Tenth Circuit Court whereas the Diaz ruling was handed down by the Ninth Circuit Court. Thus, technically the 1906 Act is unconstitutionaly vague only in Arizona and the other states (California, Nevada, Idaho, Oregon, Washington, Montana) within the Ninth Circuit jurisdiction. While judges in the Tenth Circuit could, if they chose, rule on a case by following the Diaz decision they are under no obligation to do so.

In the Ninth Circuit on the other hand, prosecutors have been very reluctant to bring additional cases before the Bar since they could simply be tossed out due to the unconstitutionality ruling. As a result other avenues for dealing with offenders have been explored such as those reported by McAllister and by Friedman (this volume).

## United States vs. Quarrell and Quarrell

On the morning of Friday, October 3, 1975, as two Forest officers were departing the Mimbres Ranger Station, Gila National Forest, New Mexico, they noticed three people in a light colored pickup truck, rumored to be that of a known pothunter. They followed the vehicle up State Highway 61 to McKnight crossing where it left the highway and proceeded up a dirt road along the Mimbres River. Later that morning while engaged in their assigned duties, involving fire pre-attack work, they noticed the pickup parked on the west side of the Mimbres River across from their location on an opposite ridge. After searching, they located three individuals about ½ mile downstream from the pickup. Two of the people were seen to be digging on the top of a small bluff overlooking the Mimbres River, while a third appeared to be posted as a lookout. Since the officers were on a ridge on the oppostie side of the river their presence was apparently not detected by the diggers.

The two officers returned to their vehicle where they called the District Ranger and reported their observations. The Ranger was involved in another enforcement case with two Grant County Sheriff's Deputies. The deputies were invited to assist in the investigation of the supposed illegal digging case as was the Gila National Forest Law Enforcement Officer and another Forest officer from the Mimbres District. A plan for apprehending the suspects was devised and around 1:00 p.m. implemented.

First, a vehicle was placed at the McKnight crossing cattleguard to block the one way road in case the suspects fled. Then two Forest officers and a deputy returned to the east side of the Mimbres River and stationed themselves in a position to observe and photograph the suspects. They were equipped with binoculars and a radio to allow communication with the other officers. The remaining officers and deputy then approached the area of the digging cross-country from the northwest. They located and photographed the suspects' truck and then, guided by the officers on the east side of the Mimbres, were able to observe events at the digging area. A sheriff's deputy approached the suspects, two of whom were still digging upon his arrival. Pottery, manos, metates, a stone blade and other artifacts were positioned next to the fresh potholes some of the pottery resting inside a blue cap. Various digging implements including shovels and picks along with a screen were present. Each of the suspects was asked if he understood English and after an affirmative

reply they were read their Miranda rights. When the other officers arrived at the scene the suspects were informed that their activities were illegal and released. All of the tools and artifacts involved were tagged as evidence and placed in the custody of the Forest law enforcement officer who kept them locked up for trial.

My involvement with the case began the following Monday, October 6, when I traveled to Gila National Forest Headquarters in Silver City where I was briefed on the case. The following day I visited the site in the company of Forest officers involved with the case. I was shown the various potholes, where the suspects had been digging when they were apprehended, and locations of the evidence which had been collected. I was able to confirm that the site was authentic Mimbres culture dating to around 1000 A.D. and that between seven and ten rooms had been disturbed, as well as a pithouse.

The Site (AR-03-06-05-32) is located on the west side, first terrace, above the Mimbres River at an elevation of 6375 feet. Pinyon-juniper vegetation dominates the immediate site environment but riparian species are available within about 50 feet in the river bottom below. Mixed ponderosa and pinyon-juniper forest occurs a few hundred yards away at higher elevations and along ephemeral drainage channels tributary to the Mimbres. The site is located in an area of high prehistoric population density with many smaller and larger sites scattered up and down the river.

After visiting the site, discussions were held regarding how best to pursue the case. It was decided that an additional "expert" opinion by an archeologist as well as three professional appraisals of the value of the specimens were needed. The necessary arrangements were made to bring these experts to Silver City. On October 6, I revisited the site in the company of the additional archeologist who confirmed my findings. That afternoon with the appraisers and in the presence of the Forest law enforcement officer we examined the artifacts removed from the site as evidence. The stone artifacts were separated into individual lots as were pottery vessels and sherds from the same vessel. The remaining individual sherds were then grouped by categories such as corrugated, black-on-white, plain, etc. All the specimens were then verified as to authenticity, independently appraised, and notorized statements to that effect prepared. The average value based on the three appraisals was $2,706.17 for the approximately 150 specimens.

Documentation prepared on the site and specimens was combined with additional case report materials and turned over to the United States Attorney for the District of New Mexico. On January 13, 1976, the U.S. Attorney filed an INFORMATION charging:

> On or about the 3rd day of October, 1975, at a location within the Mimbres Ranger District, Gila National Forest, in the State and District of New Mexico and on lands owned and controlled by the United States, the defendants MIKE J. QUARRELL and CHARLES L. QUARRELL did, without permission of the Secretary of Agriculture, excavate from a prehistoric ruin certain antiquities, to-wit: bowls, tools, and utensils, all artifacts of the Mogollon Culture, of an approximate age of 800 to 900 years.
>
> In violation of 16 USC 433.

Trial was held before Magistrate John Darden on May 13, 1976, in Las Cruces, New Mexico after the defendants entered a plea of not guilty. During the presentation of the Government case I was sworn as an "expert" witness to testify to the authenticity of the site and artifacts. The second archeologist was held as a rebuttal witness whose testimony was not necessary. Defense council argued two main points; first, that the defendants did not know they were on Government property and second, that the charges should be dismissed because the Act was unconstitutionaly vague. The first argument was not germane since the Act does not require foreknowledge of land ownership. It was only incumbent upon the Government to prove that the offense occurred on Government land which was done through the testimony of a licensed surveyer. The constitutionality argument was based on Diaz.

In the Government's reply to the Diaz argument, Assistant U.S. Attorney Robert B. Collins cited United States vs. National Dairy Corporation (372 U.S. 29(1963)), and United States vs. Raines (362 U.S. 17(1960)), which establishes that constitutionality of a statute must be determined on the basis of the facts of a particular case. Collins went on to show that based on expert testimony it was clear that the site and objects were between 800 and 900 years old and, therefore, clearly "objects of antiquity."

On June 1, 1976, Magistrate Darden in a FINDINGS OF FACT AND CONCLUSIONS OF LAW (Appendix 1) agreed with the Government's position and found the defendants guilty. They were sentenced to perform 40 hours of community service and in addition were placed on 1-year probation. There was no appeal.

Magistrate Darden's enlightened decision clearly ran counter to the Ninth Circuit Court ruling. Since New Mexico is in the Tenth Circuit and since Magistrate Courts are not courts of record (i.e., their decisions are not usually written up to be cited as case law) the decision seemed to be precedent setting only for New Mexico. However, it soon became clear as a result of the Camazine case (Collins and Green 1978:1057) that no precedent had been set. Briefly, Camazine was another case brought before a Magistrate Court this time in

Albuquerque on August 15, 1977. It involved illegal excavation on the Zuni Reservation in which the defendant was apprehended on the site. Prior to the trial defense filed a motion for dismissal on the basis of Diaz. During trial the Magistrate, David R. Gallagher, declined to rule on the motion to dismiss prior to the presentation of the Government's case. Despite the testimony of two expert witnesses that the ruin and artifacts dated from between 1100-1200 A.D., Gallagher ruled that the Antiquities Act was "unconstitutionally vague on its face and fatally vague as applied to the facts of the case" (Collins and Green 1978:1057). This ruling, after the presentation of the case, prevented an appeal under the double jeopardy clause of the Constitution's Fifth Amendment.

Thus, by the summer of 1977 the issue of the constitutionality of the Antiquities Act was more clouded. New Mexico now had two different rulings at the same jurisdictional level, and the Ninth Circuit had a ruling based on "facts of the case" which many of us felt were not appropriate. A degree of resolution to the problem occurred in the fall of 1977 when another case developed in New Mexico.

## Smyer-May Case

The Mimbres Ranger District of the Gila National Forest was, again, the scene. During October 1977, Forest officers of the Mimbres District noticed fresh digging at a site (AR-03-05-06-250) on a tributary of Sapillo Creek just over the divide from the Mimbres River. No individuals were encountered at the site but the District Ranger decided to observe the area and it was put on the patrol schedule for District personnel. In addition a dirt track which led past an antiquities sign to the site was kept swept free of tire tracks. The strategy payed off on Saturday, October 29, when a Forest officer and a special agent made a routine check in the late afternoon. The dirt track bore the fresh prints of a large lugged tire. When they arrived at the site very fresh digging, tools, clothing, an ice chest, and several artifacts along with fresh tracks seemed to indicate that suspects were in the area and had fled. A search of the vicinity revealed a pickup truck with the distinctive tire tread identical to that noticed where the road had been swept. Further searching revealed another site (AR-03-06-05-251) near the truck which also had fresh potholes.

A radio message was sent to District headquarters and additional personnel were dispatched to help with the investigation. All of the evidence was photographed, tagged, bagged and placed under lock by the special agent. While looking for vehicle identification a photograph was discovered which showed an individual and three human skulls on site 250. The truck was impounded and towed to Silver City to await the issuing of a search warrant.

My involvement began on Monday morning, October 31, with a phone call reporting the developments of the previous Saturday. After consultation with Forest Service law enforcement I left for Silver City in the company of a non-Forest Service archeologist as a potential backup witness. That evening we were briefed on the case by the special agent and shown six Mimbres pottery vessels, a bone awl, and a clay figurine which had been turned over to the agent by one of the two suspects. On Tuesday we spent the day examining the two sites and collecting additional evidence. Our inspection of site 250 revealed several sherds with fresh breaks and others with designs that we thought might have some possibility of matching one of the vessels we had seen the night before. If a match were made this would tie the vessels even closer to the site than just the allegation by the suspect that they came from the site. In addition a great deal of human bone was recovered from the surface including several human skulls which had been deliberatly smashed showing fresh breakage surfaces.

On Wednesday morning I sorted and examined the evidence collected from site 250. None of the sherds matched the six vessels in custody. A total of 41 different vessels were represented in the sherd collection of which 18 vessels had one or more sherds with fresh breaks. This left an additional 23 vessels with old breaks which also could have been removed from the site. It seemed likely, therefore, that additional vessels from the sites might still be in the possession of the suspects. The special agent had already learned that additional pottery vessels were in the home of one of the suspects but it was unknown if any came from the sites in question.

Based on the evidence and in consultation with the U.S. Attorney's office and Forest Service law enforcement the Gila Forest Supervisor decided on Thursday morning to proceed with the investigation in an innovative manner. I had assured him that if I could match up a sherd from the site with a vessel the match would be conclusive, based on breakage pattern and the various technological and stylistic attributes of the pieces involved. It was decided, therefore, to spend two days screening the backdirt from the fresh pothunting at the two sites in order to have the best available sample of pottery from which to work. It was felt that a search warrant could then be sought to remove the additional vessels from one of the suspect's homes. Arrangements were made and ten archeologists from the Forest Service and the Mimbres Foundation arrived that evening in Silver City to assist me with the project.

Several additional aspects of the case were pursued on Wednesday and Thursday including the formal mapping by Forest personnel of the site to show the location of the various potholes and backdirt piles. Various reports were prepared and the suspect's truck was searched under warrant, by myself and the special agent. No artifacts were found and the truck was released to its owner.

On Friday morning the archeological field crew was given a briefing on the case and duties were assigned. Special attention was given to the handling of evidence. For purposes of this project only pottery and human bone were to be collected as evidence. Therefore these classes of materials were handled by three designated Forest Service evidence officers who kept the evidence in their possession. Mimbres Foundation personnel assumed responsibility for all other materials which were recovered. Each backdirt pile was photographed prior to screening. All materials were labeled in such a fashion that they could be related back to the dirt pile and associated pothole. No new excavation was undertaken, only the already excavated backdirt was screened and materials from it recovered. Work continued on Saturday and by late afternoon all of the backdirt had been screened, at which point the crew was released except the evidence officers.

Washing and labeling of the sherd and bone evidence was conducted on Saturday evening and Sunday, by the three evidence officers. After completion of this task the other two evidence officers signed over to me all of their evidence and I became custodian for purposes of making the comparisons and to await trial.

Monday, November 7, had been selected as the target date for attempting the search and seizure of pottery from one of the suspect's homes. That morning the special agent and I developed the wording necessary to request a search warrant, after which he drove to Las Cruces to obtain same. I and another Forest Service archeologist washed and labeled the evidence collected on November 1. Then in the company of the Forest law enforcement officer we collected boxes and packing material in which to transport any pottery which might be seized. That afternoon we drove to Deming, New Mexico, where we met the special agent who had been successful in obtaining the search warrant. After carefully briefing us on proper procedures we drove to the home of the suspect. The warrant was served by the law enforcement officers while we archeologists waited in our vehicle. Once the house was secured we entered and began the task of reviewing specimens for possible seizure.

The criteria for seizure which I had developed, limited seized vessels to Mimbres pottery which had one or more missing pieces. Completely whole vessels or non-Mimbres pottery were not to be seized. During the course of search a broken but restored Mimbres vessel was discovered. This vessel was not seized since in order to make the anticipated comparisons it would have been necessary to remove the restored portions and risk damage to the vessel. Each vessel was photographed prior to removal and given an identification number. A total of 31 vessels met the seizure criteria and were removed for comparison. Each was carefully packed and a receipt was left. I was made evidence custodian.

On Tuesday the special agent transferred to me custody of the original six vessels, bone awl, clay effigy, surrendered by one of the suspects, a miniature vessel and human bone seized at the site. He retained the tools and other nonarcheological evidence. Reports and other business was attended to and I transported the archeological evidence to Albuquerque for analysis. The rest of the week was consumed in analysis of the archeological evidence.

The human bone was signed over to a physical anthropologist for analysis. Eventually he was able to determine that at least 13 different individuals were represented and in a few cases it was possible to identify some bones as belonging to the same individual. Much of the bone, however, will never be matched up. In dealing with the pottery my first step was to sort the sherds into gross categories such as black-on-white, corrugated, and plain. Comparison on the latter two categories was rapid since few of the 31 vessels fell in these classes. The black-on-white took a full day to compare. Only a single sherd (site 250) was found to unequivocally match a vessel. That single match, however, validated our original suspicion and clinched the tie of one suspect to the site. The truck did the same for the other suspect. The vessel was held as evidence and the remaining 30 returned to the owner since no further proof existed that they had been removed from Federal land.

On November 15, 1977, the United States Attorney filed an INFORMATION which charged the suspects with eleven counts. Count I is quoted:

> Between on or about the 1st day of October, 1977 and on or about the 29th day of October, 1977, at a location within the Mimbres Ranger District Gila National Forest, in the State and District of New Mexico, and on lands owned and controlled by the United States, the defendants, WILLIAM R. SMYER and BYRON R. MAY did, without the permission of the Secretary of Agriculture, excavate a prehistoric Mimbres ruin identified as archeological site AR-03-06-05-250, which was inhabited from approximately the year 1000 A.D. to the year 1200 A.D. In violation of 16 USC 433 and 18 USC 2.

Count II was for excavation of site 251. Counts III through VIII were for the six bowls removed from the sites and turned over to the special agent, Count IX was for removal of the clay effigy, Count X for removal of the bone awl and Count XI for removal of the Mimbres vessel seized during the search and matched to the sherd from site 250, all in violation of 16 USC 433 (Antiquities Act) and 18 USC 2 (Aiding and Abetting). The INFORMATION was filed with the United States District Court due to the differences in rulings on the Antiquities Act at the Magistrate level.

Counsel for defense filed a motion to dismiss, asserting, among other things, that the Antiquities Act was unconstitutionally vague. As in the Quarrell case, the United States was again represented by Robert Collins who argued in his brief that the determination of constitutionality must be made in view of the facts of a particular case. Unlike Camazine, Federal Judge Howard Bratton held a pretrial hearing in which the motions to dismiss were argued without the Government presenting its case. As one of the witnesses for the United States, I testified at the hearing that the sites and artifacts were genuine and dated from a period between 800 and 900 years ago. In cross-examination, defense attempted to cloud the issue of age by asking me if I thought objects a few years old such as ceremonial masks were objects of antiquity. The question was obviously drawn from the Diaz case. My reply was that such objects were not in my opinion "objects of antiquity."

Judge Bratton issued an ORDER dated December 28, 1977, in which all motions to dismiss were denied (Appendix 2). In that order several significant statements appear regarding the vagueness question. "The words 'ruin' and 'monument' plainly require no guessing at their meaning, and the term 'objects of antiquity' is no less comprehensible." He then cites a dictionary definition of antiquity and goes on to say, "While it may not be possible to state in the abstract a precise number of years that must pass before something becomes an object of 'antiquity' such exactitude is not required." He further states, "When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain." Thus, Judge Bratton's decision settled, for the time being, the issue of constitutionality for the Tenth Circuit Court.

The case proceeded to trial in Las Cruces, New Mexico, during January of 1978. Regarding the constitutionality issue the trial was anti-climatic although interesting in terms of what, if convicted, the sentence might be. Evidence introduced in court consisted not only of the seven Mimbres pottery vessels, awl and effigy, but the human skeletal material as well. Here was a case of not simply the taking of artifacts and disturbing the site, but of wanton disregard for the dead, including not only their disinterment and scattering about but premeditated breakage as well. The defendants were found guilty on all eleven counts and later sentenced to 6 months in jail, the sentences to run concurrently.

Defense filed an appeal with the Tenth Circuit Court of Appeals in Denver. The appeal was heard during January 1979 and the constitutionality issue was raised by the court. Arguments were heard and as this goes to press we are awaiting the decision of the Court. Should the Court find for the United States it is not known if there will be an appeal to the Supreme Court. If the Appeals Court finds for the defendants the Department of Justice will make the decision on appeal

but with two identical Circuit Court rulings the case would be difficult at best. I have every hope the Court will find for the United States based on the sound reasoning of Judge Bratton's ORDER.

In summary, the situation in New Mexico holds out hope for those of us who value our cultural heritage for its information rather than for crass commercial purposes. We have won two of three cases, the latter assuring, for the time being, that at the Magistrate level the Diaz arguments will not carry weight. If Judge Bratton's decision is upheld then the entire Tenth Circuit will not have to face the Diaz problem. Finally, Judge Bratton's sentencing of six months in jail if upheld will, so far as I am aware, be the first time anyone has had to serve a jail sentence for an antiquities violation.

## Reference

Collins, Robert Bruce and Dee F. Green

1978 A Proposal to Modernize the American Antiquities Act. Science, 202:1055-1059.

## NOTE

Just before press time we received a copy of the Tenth Circuit Court of Appeals ruling on the Smyer-May appeal. The Court found for the Government, thus upholding the constitutionality of the Antiquities Act for the Tenth Circuit. Appendix three reproduces the first part of the decision which relates to the constitutionality issue.

APPENDIX I

C O P Y

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br><br>Plantiff,<br><br>vs.<br><br>MIKE J. QUARRELL and<br>CHARLES L. QUARRELL,<br><br>Defendants. | ) | CRIM. No. 76-4 |

FINDINGS OF FACT

1. On October 3, 1975, Defendants Charles Quarrell and Michael Quarrell excavated the following specific objects:

a) Authentic Indian Metates;
b) Authentic maul used by ancient Indians to beat and pound;
c) Authentic Indian manos (hand grinding tools);
d) Authentic portion of an 800 to 900 year old Mogollon Indian pot;
e) Authentic Mogollon Indian pottery approximately 800 to 900 years old;
f) Authentic life form bowl approximately 800 to 900 years old;
g) Authentic sherds of Indian pots dating prior to 1,000 A.D.;
h) Authentic Indian stone axe heads;
i) Authentic Mimbres Indian tools; and
j) Authentic Indian working tools.

2. Objects of Finding 1 are objects of antiquity.

3. Defendants appropriated objects of antiquity by placing Mimbres tools and assorted sherds in a canvas bag, as well as sherds by placing them in the hat of one defendant.

4. After excavating the objects of antiquity from their location, the Defendants did injure the same by reducing archeologically the value of the said objects of antiquity.

5. The land wherein the objects of antiquity were situated and where the excavation, appropriations and injury occurred, was at Site 32 which is within the Gila National Forest by approximately 1500 feet, and was on land owned or controlled by the Government of the United States.

6. The excavation, appropriation and injury of the objects of antiquity by the Defendants was without the permission of the Secretary of the Department of the Government having jurisdiction over lands on which the objects of antiquity were located.

7. There are no signs surrounding the immediate vicinity of Site 32 warning that Site 32 was owned or controlled by the Government of the United States or that excavating objects of antiquity in said area was in violation of Title 16, United States Code, Section 433, although such signs are located at major entrance ways to the Gila National Forest and at some other road entrances and around many areas of archeological importance in and about said Forest.

8. Defendants believed at all times that they were excavating on private land.

9. Notice of hearing was timely.

10. Defendants' Motion to Dismiss on the basis that Title 16, USC, Section 433, is unconstitutional was filed in this Court prior to trial.

## CONCLUSIONS OF LAW

1. Defendants are not entitled to a Continuance and Defendants' Motion for a Continuance is denied.

2. Title 16, USC, Section 433 is not unconstitutionally vague and Defendants' Motion to Dismiss is denied.

3. Defendants were not entrapped by the failure of the United States to mark the area of Site 32 and the neighboring roadway with warning signs and Defendants' Motion to Dismiss at trial on the basis of entrapment is denied.

4. Title 16, USC, Section 433 is not unconstitutionally vague and Defendants' Motion to Dismiss on such basis is denied.

5. A verdict of guilty is entered against each Defendant for the violation of Title 16, USC, Section 433 in that each Defendant excavated objects of antiquity on land owned or controlled by the Government of the United States without permission of the Secretary of the Department of the Government having jurisdiction over lands on which the objects of antiquity were situated.

6. A verdict of guilty is entered against each Defendant for the violation of Title 16, USC, Section 433 in that each Defendant appropriated objects of antiquity on land owned or controlled by the Government of the United States without permission of the Secretary of the Department of Government having jurisdiction over lands on which the objects of antiquity were situated.

7. A verdict of guilty is entered against each Defendant for the violation of Title 16, USC, Section 433 in that each Defendant injured objects of antiquity on land owned or controlled by the Government of the United States without permission of the Secretary of the Department of the Government having jurisdiction over lands on which the objects of antiquity were situated.

IT IS THEREFORE ORDERED, that the verdict of guilty be, and it hereby is entered against Defendant Charles Quarrell and against Defendant Michael Quarrell for the violation of Title 16, USC, Section 433 on October 3, 1975, and

IT IS FURTHER ORDERED, that the United States Probation Office conduct a pre-sentence investigation and submit to this Court a selective pre-sentence report, and that upon receipt of said pre-sentence report, that the sentencing of said Defendant be held at the Federal Building in Las Cruces, New Mexico, not later than forty-five (45) days from the date hereof.

DATED this 1st day of June, 1976.

/s/ JOHN A. DARDEN III
John A. Darden III
United States Magistrate

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>vs.<br><br>WILLIAM R. SMYER AND<br>BYRON R. MAY,<br><br>Defendants. | ) | CRIM. NO. 77-284 |

ORDER

This matter coming on for consideration upon the Motions of defendants to dismiss, for a bill of particulars, for discovery, to suppress evidence and for the return of seized property, and the Court having considered the evidence adduced at the Motion hearing, the memoranda filed, together with the entire file in this cause, it is concluded that the Motions are disposed of as follows:

One portion of defendants' motion to dismiss is based on the theory that the Antiquities Act, 16 U.S.C. § 433, under which defendants are charged, is unconstitutionally vague.1/ It is defendants' position that regardless of what it is that they are alleged to have done, a person of ordinary intelligence who "explores the desert and the forrest [sic] for arrowheads, chards (pieces of pottery) [or] old bottles" cannot anticipate whether the objects he finds fall within the scope of the words "any historic or prehistoric ruin or monument, or any object of antiquity." Defendants' basic argument is that they can easily imagine hypothetical situations in which it would be difficult to determine whether a particular course of conduct violates the Act and that, accordingly, the Act is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

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1/The Act provides as follows:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

The proper analysis to be followed under the circumstances2/ is suggested by United States v. National Dairy Products Corp., 372 U.S. 29 (1962), in which the Supreme Court considered an attack upon § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, for vagueness. In that case National Dairy had been indicted for selling milk "at unreasonably low prices for the purpose of destroying competition." The indictment specified that National Dairy had intentionally sold milk below cost. National Dairy moved to dismiss the Robinson-Patman counts on the ground that the statutory provision, "unreasonably low prices," was so vague and indefinite as to violate the due process requirement of the fifth amendment.

National Dairy argued that § 3 should be tested solely "on its face" rather than as applied to the acts charged in the indictment. The government took the position that in considering an attack for vagueness the Court ought to determine whether the statute was unconstitutionally vague in its application to the conduct alleged in the indictment, regardless of whether or not there is doubt as to the validity of the statute in all its possible applications. Before concluding that § 3 is not unconstitutionally vague, the Court explained the proper course for analysis:

> It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.
>
> We do not evaluate § 3 in the abstract. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . ." * * * United States v. Raines, 362 U.S. 17, 22 (1960).

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2/ It is noted that the Antiquities Act is not a statute which infringes upon first amendment interests, as in Broaderick v. Oklahoma, 413 U.S. 601 (1972), or which, like a vagrancy ordinance, established "no standards governing the exercise of the discretion granted by the ordinance, [and thus] permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1971). Consequently, the increased scrutiny appropriate in considering a challenge for vagueness of a statute in either of these categories is not applicable here.

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. * * * Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. * * *
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. * * * In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. * * * In view of these principles we must conclude that if § 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them. * * * We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with predatory intent was within its prohibition of "unreasonably low prices." (citations and footnotes omitted)

National Dairy Products Corporation, at 32-33.

Applying the same analysis to the facts in the present case, the question is whether the Antiquities Act gave defendants sufficient notice that the excavation of two 800 to 900 year old Mimbres Indian ruins and the appropriation from such ruins of seven classic Mimbres black and white bowls, a bone awl and a clay effigy, all of which are approximately 800 to 900 years old, was within the prohibition of the Act.

The words "ruin" and "monument" plainly require no guessing at their meaning, and the term "objects of antiquity" is no less comprehensible. Webster's Third New International Dictionary defines "antiquity" as "ancient times; times long since past," so an object of antiquity is an object out of or from ancient times or times long since past.

While it may not be possible to state in the abstract a precise number of years that must pass before something becomes an "object of antiquity," such exactitude is not required.

> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language [of a statute challenged for vagueness is acceptable if it] conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

United States v. Petrillo, 332 U.S. 1, 7-8 (1946), See American Communications Association v. Doud, 339 U.S. 382, 412 (1950). As we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1971). The Antiquities Act must necessarily use words "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" id, in order to accomplish its purposes.

It is clear that the acts alleged in the information fall squarely within the proscription of the Antiquities Act. In light of what the evidence adduced at the motion hearing indicated was the defendants' experience with Indian artifacts and the age of the artifacts described in the information, the argument that the defendants could not reasonably have had notice from the language of the Antiquities Act that their alleged activities violated that statute is simply not credible. When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain.3/

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3/The Ninth Circuit Court of Appeals reached a contrary result in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). The defendant in that case was charged with violation of the Antiquities Act for having appropriated some face masks from an Indian reservation. Although it was established at trial that the masks involved were only 3 or 4 years old, a professor of anthropology testified that such masks were "objects of antiquity" because they were related to religious or social traditions of long standing. Accepting that definition, the court held that the Act was void for vagueness, for it gave no notice of the meaning of "undefined terms of uncommon usage." 499 F.2d at 115.

Presented with the facts of that case, the Ninth Circuit opted not to give the Antiquities Act a limiting construction, which would have avoided an "unnecessary pronouncement on constitutional issues, [and] premature interpretations of statutes in areas where their constitutional application might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960). As the Supreme

Another portion of defendants' Motion to dismiss is based on the theory that the information unfairly multiplies charges. This portion of the Motion is not well taken, and will be denied.

The Motions to suppress are not well taken, as the evidence adduced at the Motion hearing establishes that the items recovered were the fruits of valid searches, and the statements made by the defendants were given freely and voluntarily after defendants had been advised of their rights. The Motions to suppress will be denied.

The Motion for a bill of particulars is not well taken and will be denied.

Finally, with respect to the Motion for discovery, the government has stated that it either has complied or will comply with all of defendants' requests with the exception of a request for a list of government witnesses. Such information is not discoverable pursuant to Rule 16, and that portion of the motion will be denied; Now, Therefore,

IT IS BY THE COURT ORDERED that defendants' Motions to dismiss, for a bill of particulars, and to suppress evidence be, and hereby are denied, as is that portion of defendants' Motion for discovery which seeks discovery of a witness list.

/s/ Howard Bratton
UNITED STATES DISTRICT JUDGE

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Court has stated, "Our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973). At any rate, it is extremely doubtful that Congress intended the Antiquities Act to prohibit the acquisition of objects manufactured as recently as 3 or 4 years ago.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>WILLIAM R. SMYER and BYRON R. MAY,<br><br>Defendants-Appellants | ) | Nos. 78-1134<br>78-1135 |

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 77-284-CR)

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Robert Bruce Collins (Victor R. Ortega, United States Attorney, with him on the brief) for plaintiff-appellee.

Frederick H. Sherman (Sherman and Sherman, with him on the briefs) for defendants-appellants.

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Before McWILLIAMS, BREITENSTEIN and McKAY, Circuit Judges.

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BREITENSTEIN, Circuit Judge.

After trial to the court without a jury, the defendants-appellants were found guilty of each count of an eleven-count information charging violations of 16 U.S.C. § 433 which relates to American antiquities. They received 90-day concurrent sentences on each count.

The offenses occurred in the Mimbres Ranger District, Gila National Forest, New Mexico. Count I charges that, without permission from the Secretary of Agriculture, the defendants excavated a prehistoric Mimbres ruin at an archaeological site, herein designated as 250, which was inhabited about 1000-1200 A.D. Count II charges excavation of a ruin at a site designated as 251. Counts III through XI charge the appropriation from the ruins of specified objects of antiquity, 800-900 years old.

The two sites are about 300 yards apart and may be approached either from the north or the south. Forest Rangers had observed "very wide, deep-lugged" tire tracks at the sites. On October 29, 1977, a Forest Service Recreation Officer, Roybal, discovered that a vehicle with "wide, deep-lugged" tires had entered the northern road leading to the sites and had passed a Forest Service sign warning that the area was protected by the American Antiquities Act. Upon his request for assistance, Ranger Bradsby and Enforcement Officer Dresser came and the three followed the tire tracks to the ruins. They found freshly dug holes at each ruin, shovels, picks, a sifting screen, and a small pottery bowl. In an arroyo between the sites they found a four-wheel drive truck, the tires on which matched the earlier discovered tire marks. No one was present at the sites. The officers inventoried the contents of the truck and had it towed away.

That evening defendant May came to Ranger Bradsby's home and said that "he had been scouting for deer and that his truck had been stolen." A few days later federal officers interviewed, and obtained statements from, both May and Smyer. The officers took some artifacts from Smyer's home without objection and later, on the execution of a search warrant, seized other pieces of Indian bowls.

Defendants urge that the Antiquities Act is unconstitutional because it is vague and uncertain. The Act, which was passed in 1906, provides:

> "Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisidiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

The claim of vagueness and uncertainty is based on the use in the statute of the words "ruin," and "object of antiquity." In United States v. Diaz, 9 Cir., 499 F.2d 113, 114-115, the Ninth Circuit held that "the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution." We respectfully disagree. In Diaz the charge was appropriation of objects of antiquity consisting of face masks found on an Indian Reservation. The masks had been made in 1969 or 1970. The government evidence was that "'object of antiquity' could include something that was made just yesterday if related to religious or social traditions of long standing." Id. at 114. Those facts must

be contrasted with the instant case where the evidence showed that objects 800-900 years old were taken from ancient sites for commercial motives. We do not have a case of hobbyists exploring the desert for arrow heads. See, Id. at 114. Defendants admitted visiting the sites on several occasions and May had sold Mimbres bowls to an archaeologist.

The charges here were the excavation of two ruins and the appropriation of several objects of antiquity. The defendants' attack can go only to "ruin" and "antiquity." A ruin is the remains of something which has been destroyed. Webster's New International Dictionary, 2d Ed., 1960, p. 2182, ruin (4). Antiquity refers to "times long since past." Id. p. 119, antiquity (1). When measured by common understanding and practice, the challenged language conveys a sufficiently definite warning as to the proscribed conduct. United States v. Petrillo, 332 U.S. 1, 8; see also United States v. Goeltz, 10 Cir., 513 F.2d 193, 196-197, cert, denied, 423 U.S. 830.

The case under consideration is not a "sit-in" case like Bouie v. City of Columbia, 378 U.S. 347, a vagrancy case like Papachristou v. City of Jacksonville, 405 U.S. 156, nor an antipicketing case like Grayned v. City of Rockford, 408 U.S. 104. We are not concerned with the deprivation of any First Amendment right. In their briefs defendants charge selective enforcement, but their claim has no support in the record. The statute in question was designed for the protection of American antiquities. It affects the property of the United States and is well within the power over public lands given to Congress by the federal Constitution. Art. IV, § 3, cl. 2.

In assessing vagueness, a statute must be considered in the light of the conduct with which the defendant is charged. See United States v. National Dairy Products Corp., 372 U.S. 29, 32-33. The Antiquities Act gives a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited. See, Grayned v. City of Rockford, 408 U.S. 104, 108. We find no constitutional infirmity in § 433.

# THE DESTRUCTION OF THREE SITES IN SOUTHWESTERN NEW MEXICO

by

Paul E. Minnis and Steven A. LeBlanc

The destruction of three important prehistoric sites in southwestern New Mexico provides a clear example of the need for vigorous and coordinated site protection activities, and the consequences of the failure to implement such efforts. These three pueblo sites known locally as the Black Mountain sites and recorded as LA 49, Z:9:5(ASM), and Z:9:17(ASM), were located on New Mexico State Trust Lands, and so were protected by state law. These sites have been known to archeologists for over 70 years, and apparently one was the largest pueblo site in the entire Deming region and was criticial for the ultimate understanding of the prehistory of the area.

## The Sites

LA 49 (Z:9:1 ASM) was located on a distinct bench above the Rio Mimbres floodplain west of the channel. The site consisted of five distinct clusters of artifact scatters, mounds, and areas of vandalization. The five clusters were enclosed in an area of approximately 60,000 square meters (200 meters by 300 meters). When first visited by Mimbres Foundation survey crews in 1976, the clusters were badly pothunted by hand digging and extensive bulldozing (Figure 1). Despite this vandalism, it appears that this site consisted of five adobe room blocks with rooms arranged around small plazas. The field crew estimated the presence of around 300 rooms at the site, though size estimates of adobe pueblos are difficult to make and are subject to much error. The survey crew estimated that approximately 95% of the room blocks had been destroyed. However, in some bulldozed cuts intact areas and adobe walls were visible. The survey crew mapped and recorded the site as well as making an extensive systematic collection of surface artifacts. On the basis of extensive survey in the area, this site appears to be the largest Animas phase site in the Rio Mimbres drainage/Deming Plains region.

Several more visits in 1976 were made to the site to monitor any further destruction. During 1977, the site was revisited while making preliminary plans to begin limited excavation in areas on the site which were believed to still be intact. On arriving at the site, we found that the mounds had been levelled to fill in the potting holes. This process also removed traces of undisturbed areas as well as causing undetermined damage to intact parts. This leveling so obliterated the evidence of what had been disturbed and what was potentially intact that any undisturbed areas left would be prohibitively expensive to locate (Figure 2). Thus, the site has lost nearly all scientific value. Because of this leveling, plans for excavation were stopped.

Fig. 1. View of LA 49 showing heavy vandalization done prior to 1976.

Fig. 2. View of LA 49 after land leveling by mechanical equipment in 1977.

Z:9:5 is located on the same bench as LA 49 and is approximately 1.5 kilometers south of LA 49. This site consisted of two clusters of artifact density and much vandalism. In addition, there are nearly 30 bedrock mortars in an outcrop southeast of the artifact scatters. Mimbres Foundation crews recorded the site in 1976 and estimated the site to be 28,000 square meters (140 meters by 200 meters) and to have approximately 200 rooms. The configuration of the room blocks could not be determined because of the hand digging and bulldozing, but a best guess would be that there were two distinct room blocks. Oddly, some of the bedrock which contained bedrock mortars were pryed loose from their matrix and left by the vandals. Mechanical equipment must have been used to break off these rock chunks. Z:9:5 was one of the five largest Animas sites in Rio Mimbres/Deming Plain region and it was estimated that at least 80% of this site was destroyed by pothunting. As with LA 49, several visits were made to this site in 1976 and, like LA 49, this site was also levelled in 1977.

Z:9:17 is located in the Rio Mimbres floodplain east of the present channel and is at the base of Black Mountain. At present, the surface indications of the site consist of 14 distinct scatters of sherds, lithics, and groundstone. Each scatter tends to center around low rise in the otherwise flat alluvium. Today little evidence of pothunting is visible on the surface. These clusters are located in an area 180 meters by 240 meters or about 40,000 square meters (though not all this area is covered with room block deposits). Field crews of the Mimbres Foundation mapped and collected extensive artifact samples from Z:9:17 in 1976.

Local informants familiar with this site report that the site is very extensive, but the construction of an earthen dam just below this site has caused rapid alluviation of the site so that present day surface indications do not necessarily reflect the extent of the site or its vandalism. The low rises may be the tops of mounds which have not yet been covered by alluvial deposits. If so, then this site was enormous, probably being the largest Salado site in the Rio Mimbres drainage. Unfortunately the alluviation makes it impossible to determine what potential the site has for inforamtion recovery without extensive excavation. Thus, all three Black Mountain sites are known to have been heavily potted, but non-pothunting activities have made it impossible to determine what if any useful deposits remain at these sites.

## History of the Sites

A brief history of the discovery and assessment of these sites provides a useful background to view the eventual destruction of the sites. In one of the earliest archeological reports on the area, Hough (1907:87) mentions "numerous pueblo sites, some of them quite extensive are located around the base of Black Butte, 10 miles north of Deming."

Not long thereafter one of these sites (Z:9:17), was described by Nelson (n.d.:27). His description of this site, which we now feel was smaller than LA 49, is of interest. "Judged by the distribution of the visible remains, the main houses were built around a court or plaza, but there must have been smaller outlying buildings scattered far around. . . ." Nelson goes on to suggest there were four major roomblocks, one being 180 feet on one side. The major site, LA 49, was apparently well known to early archeologists in the Southwest. Kidder (1924) discusses visiting the site and cites it as evidence that the Casas Grandes culture postdated the Mimbres culture.

It is clear then that as early as 1907 and certainly by 1924 at least some of these sites were recognized as being an extremely important resource. We have, however, been unable to find any record to protect or monitor these sites by inspection, signs, fences or perhaps inclusion in the State Parks and Monuments system even though they are on state land. Unfortunately, these sites were known to local pothunters and were pothunted off and on from the early decades of the century up into the 1970's. Most large local artifact collections contain vessels, effigies, jewelry, etc. which are reputed to have come from the Black Mountain sites. In the 1970's commercial pothunters began using bulldozers and other mechanical equipment to recover pottery. The Black Mountain sites were soon victims of this incredible destructive technique.

## Significance of the Sites

After conducting a survey in the area and reviewing the literature on the archeology of southwestern New Mexico, we can begin to assess the general chronological and spatial placement of these sites and their importance. There is a long, evolving Mogollon tradition in southwestern New Mexico which culminated in the Classic Mimbres Period (LeBlanc and Whalen 1979). Two major post-Mimbres traditions have been defined for the area under consideration, the Animas (LeBlanc 1976, 1977, LeBlanc and Whalen 1979) and Salado (LeBlanc and Nelson 1976). Unlike the Mogollon which centered in the mountainous river valleys, the Animas phase, which immediately followed the Classic Mimbres, was generally centered in the more xeric regions. The Animas phase is a local manifestation of desert dwelling puebloan communities which share striking similarity with the material culture of the Casas Grandes sites of Northern Chihuahua (DiPeso 1974).

The site of Casas Grandes itself is large, around 36 hectares (DiPeso 1974:370), and was at the apex of a complex regional system. In the Mimbres drainage area, smaller sites are found, but there seems to be a size hierarchy between large sites (10,000 sq. m. and larger) and smaller sites (less than 10,000 sq. m.). The relationship between Casas Grandes and the sites under consideration here is not fully understood, but it is interesting to speculate that the larger sites may have been regional centers somehow interacting with the very

large sites such as Casas Grandes in Northern Chihuahua. This problem calls for more elegant models and better empirical data. Nevertheless the importance of these Animas sites in a regional perspective is clear.

There appear to be two clusters of Animas sites located along the Rio Mimbres in the Deming area where there was a high prehistoric water table. In these two clusters there are five large Animas sites of which all but one have been destroyed by vandalism, including bulldozing. The one intact site is on private land. A Mimbres site also on private land within 100 meters of this remaining site has been recently bulldozed by pothunters and the Animas site is hence in a very vulnerable position. Alarmingly, we are faced with a situation where only one large Animas site remains in the Deming area, and it is vulnerable to destruction.

The Salado period in the Mimbres drainage/Deming Plains area follows the Animas Phase and is represented by a small population. The Salado site here (Z:9:17) is the only Salado pueblo located in the desert region and, since it was probably the largest site, was indispensable to understanding the Salado. Unfortunately, the alluviation and unchecked looting of this site has destroyed this critical information

## The Destruction of the Sites

These sites were first visited by the Mimbres Foundation in 1976. As discussed, at that time LA 49 and Z:9:5 had been partially bulldozed and Z:9:17 had evidence of severe hand pothunting. This information was reported to the State Historic Preservation Officer who informed the State Land Office. Subsequently an investigation was instigated. The results of the investigation are not fully available to the writers, but it is understood that the lease holder claimed no knowledge of these activities; the identity of at least one bulldozer-using pothunter was known, but insufficient evidence was available for a prosecution.

It was after this investigation that the most tragic aspect of this series of events occurred. The State Land Office without consulting any archeologist or requiring any archeologist to monitor the activity, required the leasee to return the land to its original condition. This resulted in the leasee taking out heavy equipment and flattening both LA 49 and Z:9:5. This leveling covered such a broad area that today it is not possible to adequately ascertain where the sites were, much less if anything might remain. Thus, these sites are now completely lost to archeology due to an honest but naive attempt to preserve them.

## An Evaluation of the Failure to Protect These Sites

A number of lessons and concerns are brought into focus when considering the loss of the Black Mountain sites. First, a number of independent events combined to intensify the destruction of these sites. The USGS map of the area clearly located and labelled the major site as a "ruin." This undoubtedly encouraged the pothunting of these sites. The construction of the water control dam near Z:9:17 had an adverse affect on the site and was surely constructed without concern for the site. It is also clear that the State of New Mexico had no plan to monitor or care for sites on state land, not even a plan to assess or care for sites already recorded in the state's site files. Finally, the state's ad hoc efforts at protection turned out to be worse than no efforts at all. The state lost the scientific value of these sites, and it is quite possible that LA 49 could have been developed into an important interpretive site and thus contributed positively to the local economy.

What is less obvious is how the destruction of these sites is closely related to destruction of other sites on public and private land in the area. During the same interval the Black Mountain sites were being hand pothunted and bulldozed, several other major sites on BLM land in the Mimbres drainage and south of Deming were also hand pothunted and bulldozed. For example, a site on private land near Red Mountain was bulldozed without the owner's knowledge or consent (this site was also noted by Hough) and another such bulldozing was attempted on a site on private land just north of the Black Mountain sites. The only site excavated and reported on in the area, Hermanas Ruin, (Fitting 1971) was bulldozed between its partial excavation in 1970 and its recording by the Mimbres Foundation in 1977. As well, a cluster of both Animas and Classic Mimbres sites about 30 kilometers east of Columbus recorded in 1977 were found to have been bulldozed completely. In fact, in a short reconnaissance survey of known sites in the Deming/Columbus region which were not recorded in the stratified sample survey of 1976, only one had escaped bulldozing. Forty miles to the north very severe pothunting occurred on United States Forest Service land. Graybill (1974, 1975) reported approximately 95 percent of the Classic Mimbres sites in his survey area around the upper forks of the Mimbres River were vandalized. Similarly, 95 percent of the Classic Mimbres sites in the Mimbres Foundation study area have been vandalized, many by power equipment. Thus, the destruction of the Black Mountain sites was not an isolated incident but was concurrent with illegal site destruction on state, Federal and private land.

Had any of the various state and Federal laws been enforced, and had any organized plan of site protection been in effect, there surely would have been a decrease in destruction of sites on all categories of land ownership. Thus the loss of the Black Mountain sites was ultimately related to the behavior of all land managing agencies and

enforcement bodies in the area. The failure of the archeological community to educate these various organizations as to needs and procedures of protection was also a critical factor in the loss of these sites. Ultimately, this example illustrates the failure of archeologists and resource managers to educate the public to the value of archeological sites and as well as the failure to integrate the interested public into the total picture of site preservation. While the example presented here may be more graphic and obvious than others, the same factors are at work throughout the country.

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# EXAMPLES OF SITE PROTECTION FROM ACROSS THE NATION

by

Mark Barnes

Archeological site preservation was once viewed as the interpretation of exemplary prehistoric or historic sites for the public. This selective site-by-site preservation orientation was usually stimulated by significant archeological discoveries, which caused a Governmental agency to recognize the importance of the site by creating a visitors facility, installing exhibits, stabilizing the structural remains of the site and maintaining a staff at the site. The most notable Federal agency in the business of site preservation is, of course, the National Park Service. It's quality programs in site preservation throughout the United States have served as the model for state and county parks agencies for over half a century. To a lesser extent privately endowed groups and Departments of Anthropology have also been involved in this type of publicly oriented site preservation.

Today, site preservation is being more broadly interpreted. According to 36 CFR 66, site preservation can mean not only those sites left in situ, but also sites, which after appropriate decision making, have to be excavated. In this manner cultural resource studies are helping to decide which sites should be interpreted for the public or preserved in situ, and which sites are significant enough to expend funds to recover data from them when they are threatened by Federal actions. This expanded view of site preservation is being supported by contract archeology and grants-in-aid on an unprecedented scale due to the passage of Federal and state preservation legislation. Unfortunately, we still do not have the best of all possible worlds for archeological sites or even for the preservation of scientific data. In many areas of the country, the discipline suffers from lack of trained personnel, equipment and academic support to implement site preservation on the broadly based approach envisioned by preservationists.

The following case studies are designed to illustrate both the positive and negative aspects of cultural resources management that are continually facing archeologists and their resource base.

## Maine Coastal Sites

The shell midden sites found along the coast of Maine have, since the mid-19th century, been recognized as major repositories of well preserved artifactural remains of the last 5,000 years of the state's prehistory. The Damariscotta Shell Heaps are believed to contain 250,000 cubic yards of cultural fill. Yet this site, and others like it, were mined for shells to lime farm fields in the 19th century. Pothunting also contributed to coastal site destruction.

However, it was only after a multi-year reconnaisance survey of the coast was funded through matching grants-in-aid by the Maine State Historic Preservation Officer (SHPO), that the most serious threat was found to be the down warping of the sea coast and increased tidal amplitude which had destroyed untold number of sites. For example, comparison of sea levels with USGS map marks indicate that some of the coast has dropped as much as two feet since 1920, and has probably destroyed sequences earlier than 5,000 years. This survey now being supplemented by a 3-year island survey and intensive level coastal surveys are beginning to develop a series of goals which will serve to make decisions about how site preservation should be accomplished.

It should be pointed out that in Maine this comprehensive state-wide survey is geared not to just mere site location but to current professional research interests. By beginning their surveys along these lines, archeologists are able to give better direction and assistance to Federal agencies in compliance situations, and they are beginning to implement selective site preservation projects for sites threatened by both natural and man-made vandalism.

## Cahokia Mounds, Illinois

Until recently more effort had gone into describing the size and complexity of Cahokia Mounds than efforts to preserve the site for the future. Today interstate highways, blocks of suburbs, commercial enterprises and a drive-in movie cover large sections of this nine square mile site, and the continuing growth of East St. Louis threatens the remaining untouched portions of the site.

Over the last two years, the Illinois SHPO has purchased some two square miles of land at the site at a cost of nearly $2 million (half of which was provided by HPF grants-in-aid). A new interpretive center is planned, along with protective landscaping, and keeping a close watch on Federal projects within the designated National Historic Landmark boundaries. Problems still exist; land condemnation proceedings take time, non-Federal actions still adversely effect the site and funding levels for preservation are still short. But this effort has secured the preservation of the inner mound groups, wood henge site, and several of the last remaining open tracts of land in the area.

## Bear Butte, South Dakota

Bear Butte is a volcanic batholith that rises above the plains of South Dakota and is held sacred to Arapahos, Cheyennes, Sioux and Kiowas. Three-quarters of the Butte is owned by the South Dakota Parks Department, which permits Indians to practice annual ceremonies. The other quarter is privately owned and may be developed in the near furture. The entire property is listed in the National Register of Historic Places.

To date the South Dakota SHPO, South Dakota Parks Department, the Nature Conservancy and the various Indian groups are awaiting the decision of the landowners before taking action on trying to preserve this unique American Indian religious site. However, no clear cut program is yet developed to preserve the site. The loss of this important ceremonial area threatenes not just associated fragile archeological resources but an even more delicate resource--a religious concept.

## Mimbres Valley Sites, New Mexico

The first preservation effort in the Mimbres area was in 1971 for an acquisition and protection grant-in-aid from the New Mexico SHPO to the New Mexico State Parks to buy and fence off the Woodrow Ruin Site for eventual public interpretation. This was followed by a survey grant to the Mimbres Foundation, a nonprofit group, to inventory the Mimbres Valley for archeological sites. The nearly 500 sites found in the survey, catalogued for the first time the extensive damage suffered by the Mimbres and Animas period sites. It also showed there still remained significant archeological information to be recovered. The Foundation is currently preparing a thematic nomination to the National Register of Historic Places as a first step to soliciting matching funds from the New Mexico SHPO for future site preservation.

The Mimbres Foundation, headed by Dr. Steven LeBanc, is a logical out-growth of the lack of academic and institution interest in certain areas causing nonprofit groups to appear. To date, the Foundation has purchased outright or secured preservation easements to about a half-dozen sites, and excavated several others threathened with vandalism, erosion, or land development. Scientific data recovered is placed with the Maxwell Museum of the University of New Mexico. The Foundations' reputation and agressive stance on site preservation has placed them in demand as a consultant in other states.

## The Nature Conservancy

Several private foundations and publicly supported nonprofit corporations dedicated to the preservation of natural areas or unique environments have constituted a major means of archeological site preservation in an undisturbed environmental setting. However, it is only with the recent thrust of environmental archeology studies that archeologists have begun to realize the potential of working with these environmental groups to develop long-range site preservation goals in conjuncton with the preservation of the natural environment. Even more recently, have private groups understood the necessity to include cultural resource surveys of areas they were interested in acquiring.

Foremost among the nonprofit corporations dedicated to preservation of natural areas is the Nature Conservancy. Since its founding in 1951, approximately 1.4 million acres of land have been conserved by this organization, involving more than 1200 individual sanctuaries. According to a recent newsletter the present Land Acquisition Fund totals more than $30 million available to the Conservancy for land acquisition. As a nonprofit group, contributions by individuals or private enterprise of funds or land are tax deductible under Section 170(f)(3) of the United States Tax Code. In addition, the Conservancy can also seek funding from various Federal, state and local funding levels when applicable to their needs.

Conservancy purchase of an area (either fee simple or to obtain preservation easements) is decided through a program of identifying unique natural areas and developing a Master Plan, or acquisition strategy to enlarge existing sanctuaries or create new ones. Once acquired, either through gift or purchase, the Conservancy may resell or donate the land to a Governmental agency or private group who has agreed to manage the area. The Conservancy manages approximately 50 percent of the areas it acquires, some 660 preserves throughout the United States, Canada, Virgin Islands, and the Carribean.

To date, the Nature Conservancy has purchased several areas of recognized archeological importance; for example, Shell Island Key, Florida, Virginia's Barrier Islands, portions of the Flint Hills of Kansas and Damariscove Island, Maine. In addition, many acquisitions are currently being worked on which include archeological surveys to locate and nominate to the National Register significant sites in order to insure protection of their future holdings as a means of promoting matching grants-in-aid from an SHPO.

The Conservancy is planning an archeological survey of the Virginia Barrier Islands, which will utilize Survey and Planning funds from the Virginia Landmarks Commission, and has received a development grant-in-aid from the Commission to rehabilitate Brownsville, an early 19th century plantation house, for use as a resident caretaker facility and scientific center for the study of the islands. Acquisition studies are also in progress for the Tenasaw River Basin, in the Mobile Delta area of Alabama, which contains numerous Archaic shell middens and Temple Mound period complexes. In addition, the acquisition of Soapstone Ridge, Georgia, containing the largest Late Archaic soapstone quarry in the Southeast is currently under study. The Conservancy recently completed the $2,500,000 acquisition of Santa Cruz Island, which contains over 3,000 known Chumash Indian sites. The owner of Santa Cruz Island and the Conservancy worked out an agreement whereby he received $50 an acre, for his portion of the 60,000 acre island. The difference between $50 and an estimated $5,000 an acre will be used by the owner as a tax write-off stretched over several years. Acquisition of several parcels of land on North Carolina's Cape Hatteras, using a mixed fee simple and easement acquisition has preserved many known shell midden sites.

Much of the money raised by the Conservancy comes from other non-profit institutions or foundations which were created by private individuals and private businesses for philanthropic and tax purposes. As an example, $4.7 million were given by the Mary Flagler Cary Charitable Trust to help the Conservancy purchase the Virginia Barrier Islands. Many of these foundations are listed in the Foundation Directory, which includes over 2,500 foundations with assets of over $1,000,000 each. Some private businesses and corporations have even formed conglomerate foundations, such as the Business Committee for the Arts, whose contributions have risen from $22 million in 1967, to $221 million in 1976. One of the most important aspects of the Conservancy is that they develop a Master Plan on how to protect and manage a property.

## Puerto Rican Site Destruction

In early 1978, a housing developer using Federal permits began bulldozing a coastal area of western Puerto Rico for condominiums. It was soon discovered that whole polychrome burial vessels, shell middens areas, ceremonial areas, burials, shell and stone artifacts, and prehistoric house pits were being uncovered. Amateurs began flocking to the site to "recover" artifacts for their collections from this heretofore unknown major site. The Puerto Rico SHPO's Office was unable to mobilize any effective scientific recovery operations because of a lack of manpower, equipment and legislation which would cover such situations. As a result, the nonprofit Archeology, Anthropology, and History Foundation of Puerto Rico utilized its own resources to document what the amateurs had recovered before the area was bulldozed for new housing.

Numerous newspaper articles citing the efforts of the amateurs and the Foundation to save a portion of the site caused the Puerto Rico SHPO to revise their Federal permit review program, and to try and prevent incidents like this from occurring again.

## Tahquitz Canyon, California

Tahquitz Canyon, outside Palm Springs, California, was nominated to the National Register as an archeological district because of its large number of sites grouped around desert springs. Originally part of the Aguas Caliente Indian Reservation which completely surrounds Palm Springs, the area was given to individual tribal members to dispose of as they wished.

Palm Springs applied for, and received matching grant-in-aid from the California SHPO to purchase Tahquitz Canyon as part of a green-belt around the city to preserve both the archeological sites and unique desert ecosystem from being developed. The city intends to ensure protection of the sites and any development in the area will be done in conjunction with the University of California at Riverside, Department of Anthropology and the Aguas Caliente Indians as advisors.

## Blakely

The Historic Blakely Foundation is interested in the acquisition of some 3,600 acres of the site of an early 19th century town. Blakely is built upon numerous shell middens of the Archaic period of the Mobile Delta. Mary Grice, the director of the Historic Blakely Foundation has used her experience as a former Federal grants administrator to encourage the donation of several hundred acres of land to the Foundation in exchange for tax benefits. She has received a $7,000 Survey and Planning Grant to test various archeological sites and develop a program for site interpretation. She has also received a $185,000 grant from the Department of Housing and Urban Development (HUD) Innovative Grants Program to develop a program for the preservation and interpretation of the site.

## Galivan Foundation

The Galivan Foundation was set up at Cabrillo College in Santa Cruz, California, as a nonprofit organization to receive donations of funds and land containing archeological sites from private individuals and companies for the Federal tax incentives offered by Section 170(f)(3) of the US Tax Code.

They are already negotiating the donation of a large prehistoric site in the Coast Range Mountains but with a twist. Previously donations of land were evaluated only on the basis of the development potential of the land and the archeological data were not considered to have a marketable value. However, this is based upon a similar situation in Tennessee in which the landowner claimed a deduction based on what it would cost to recover the data from an archeological site. If the Galivan Foundation could establish with the Internal Revenue Service a market value of donated land at its development potential, and what it would cost to excavate a site, then there would be a major lever for preservation of sites.

## Osburne and Dravo Sites

The Osburne site in Texas and the Dravo site in Ohio, were both listed on the National Register of Historic Places after a professional archeological evaluation showed that they were eligible and that both were threatened by non-Federal projects. In the case of the Osburne site, the Sabine River Authority was willing to put up the matching share for salvage excavation. The Dravo matching share would come from the in-kind services of a field school of researchers working on Archaic Ohio River Valley problems.

Unfortunately, under Heritage Conservation and Recreation Service's current grants-in-aid program data recovery of a threatened site is not considered a preservation technique. This rule is felt by many

State SHPO's to be in direct opposition to the language of 36 CFR 66, which sets out standards for contract archeology. It has been the general feeling that threatened sites should be acquired and preserved as opposed to salvaged. As a result, the Osburne Site, which turned out to contain important Archaic and Early Caddoan material, could only be partially excavated.

## Conclusion

The above examples have illustrated both problem areas and progressive solutions. What we needed is a concerted effort on the part of all people in a state concerned with site preservation to implement the 1966 National Historic Preservation Act and Executive Order 11593 to locate, inventory and evaluate cultural resources as a first step in the decision making process. As this goal is being achieved, site preservation alternatives must be established, such as, purchasing of sites for interpretation, and preservation by putting land in the hands of a Governmental agency or nonprofit group that can insure its protection. Other alternatives are the development of economic incentives to protect land in private ownership, life tenancy, purchasing preservation easements, tax advantages from Federal and state tax codes. At the same time there must be a means of breaking the weak link of site preservation where sites threatened by non-Federal action have not become part of a preservation plan. In some states, this is being resolved by the closer cooperation of the SHPO and Departments of Anthropology who monitor such sites and direct their field schools to the recovery of data from those sites which meet current research needs and interests.

CASE SUMMARIES

The following list of case summaries on antiquities violations includes cases of record as well as the magistrate appearances that are known to us. Readers are invited to provide any additional information of which they are aware so that this list can be updated.

Date:
Defendant: Ben Diaz
Offense: removal of ceremonial masks
Location: San Carlos Apache Reservation, Arizona
Citation: 16 U.S.C. 433 (Antiquities Act 1906)
Plea: not guilty
Court: Magistrate, Phoenix, Arizona
Decision: guilty
Appeal: District Court of Arizona
Decision: upheld
Appeal: Ninth Circuit Court
Decision: Reversed on grounds that the statute is unconstitutionally vague

Date: October 1975
Defendants: Charles and Michael Quarrell
Offense: excavating in a prehistoric ruin
Location: Mimbres Ranger District, Gila National Forest, New Mexico
Citation: 16 U.S.C. 433 (Antiquities Act 1906)
Plea: not guilty
Court: Magistrate, Las Cruces, New Mexico
Decision: Guilty
Sentence: 40 hours of public service work, and one year supervised probation
Appeal: none

Date: July 1977
Defendant: Scott Camazine
Offense: excavating in prehistoric ruin
Location: Zuni Indian Reservation, New Mexico
Citation: 16 U.S.C. 433 (Antiquities Act 1906)
Plea: not guilty
Court: Magistrate, Albuquerque, New Mexico
Decision: Upheld Diaz, statute is unconstitutionally vague
Appeal: none

Date: October 1977
Defendants: William R. Smyer and Byron R. May
Offense: excavation of a prehistoric site, removal of artifacts from prehistoric site
Location: Mimbres Ranger District, Gila National Forest, New Mexico
Citation: 16 U.S.C. 433 (Antiquities Act 1906)
Plea: not guilty
Court: District Court, New Mexico
Decision: guilty
Sentence: 90 days in jail
Appeal: Tenth Court - by defendants
Decision: Conviction upheld

Date: December 1977
Defendant: Donald Lowden
Offense: excavation of a prehistoric site
Location: Cave Creek Ranger District, Tonto National Forest, Arizona
Citation: 36 CFR 261.9(e) (Prohibitions)
Plea: guilty
Court: Magistrate, Phoenix Arizona
Sentence: $25 fine

Date: December 1977
Defendants: Kyle R. Jones, Thayde L. Jones, Robert E. Gevara
Offense: excavation of a prehistoric site, removal of artifacts from a prehistoric site
Location: Cave Creek Ranger District, Tonto National Forest, Arizona
Citation: 31 U.S.C. 641 (Embezzlement and Theft) and 65 U.S.C. 1361 (Malicious Mischief)
Plea: not guilty
Court: District Court, Arizona
Decision: Motion to Dismiss granted
Appeal: Ninth Circuit Court - by United States
Decision: pending

Date: January 1978
Defendants: Stephen Sheridan, David Osman, Judith Holman
Offense: excavation of a prehistoric site, removal of artifacts from a prehistoric site
Location: Hells Canyon National Recreation Area, Wallowa-Whitman National Forest, Oregon
Citation: 31 U.S.C. 641 (Embezzlement and Theft) and 65 U.S.C. 1361 (Malicious Mischief)
Plea: guilty
Court: Magistrate, Oregon
Sentence: $500 fine, one year in jail suspended, 50 hours public service work
Appeal: none

Date: April 1978
Defendants: Larry S. Behrends and Gary H. Behrends
Offense: excavation of a prehistoric site, removal of artifacts from a prehistoric site
Location: Tonto Basin Ranger District, Tonto National Forest, Arizona
Citation: 36 CFR 261.9(e) (Prohibitions)
Plea: guilty
Court: Magistrate, Arizona
Sentence: 1 year probation with deferred sentencing
Appeal: none

Date: April 1978
Defendants: three white males
Offense: excavation of a prehistoric site
Location: St. Francis Ranger District, Ozark National Forest, Arkansas
Citation: 36 CFR 261.9(e) (Prohibitions)
Plea: guilty
Court: Magistrate, Arkansas
Sentence: $25 fine each
Appeal: none

Date: October 1978
Defendant: Carroll S. Michael
Offense: removal of artifacts from a historic site
Location: Globe Ranger District, Tonto National Forest, Arizona
Citation: 36 CFR 261.9(e) (Prohibitions)
Plea: guilty
Court: Magistrate, Arizona
Sentence: 6 months probation with deferred sentencing
Appeal: none

Date: October 1978
Defendants: Jeffrey W. Peterson and Elizabeth A. Elmore
Offense: excavation of a prehistoric site
Location: Gold Beach Ranger District, Siskiyou National Forest, Oregon
Citation: 36 CFR 261.9(e) (Prohibitions)
Plea: guilty
Court: Magistrate, Grants Pass, Oregon
Sentence: none

MISCELLANEOUS DOCUMENTS AND EXHIBITS

The following pages contain a variety of documents, photos, and other items which have bearing on the overall concerns associated with vandalism to cultural resources. Readers are invited to send additional items of interest.

# LEGALIZED THEFT

Unless Congress acts with remarkable swiftness to pass a new law against theft of Indian artifacts from federal land, a great archeological treasure will be lost forever.

At this moment, robbers doubtless are digging with a frenzy in Indian ruins all over Arizona because the taking of artifacts is no longer a crime, thanks to federal court rulings.

U.S. District Court Judge William P. Copple dismissed charges the other day against three men accused of stealing artifacts from Tonto National Forest Lands, stating that appeals courts rulings in similar cases prohibited their prosecution.

The judge doubtless applied the law in the only way possible, but the effect of the ruling nevertheless is to authorize a massive raid on archeological sites.

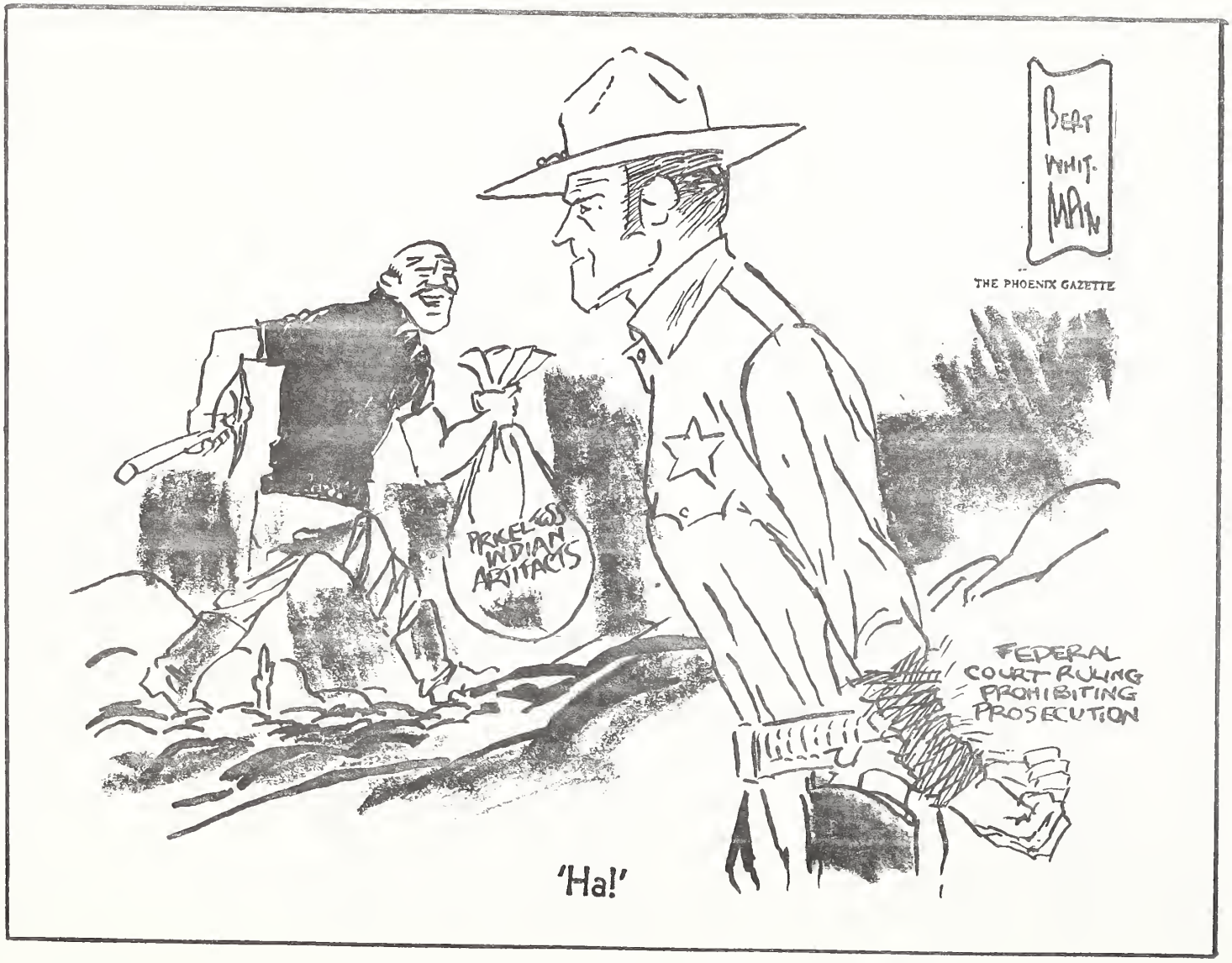
The men in the case before Judge Copple were accused of taking bone awls, human skeletal remains and other artifacts, all appraised at a value of $6,000 to $8,000 by an archeologist.

While artifacts do have a dollar value, they are in reality priceless. Somewhere in plunder that will be gouged out of ruins during the court-orderd period of legal theft may be something that would explain what happened to the Hohokam, an ancient civilization that prospered here for years--and vanished.

That information could be of more than passing interest to people here today and those yet to come. Knowledge of the past might easily provide important insight into the future.

Congress can move quickly in an emergency. It is to be hoped that the delegation from Arizona and other states rich in archeological sites can prompt Congress to act within days.

Courtesy
THE PHOENIX GAZETTE
Friday, April 14, 1978
page A-6; EDITORIAL


BEAT WHIT. MAN
THE PHOENIX GAZETTE
PRICELESS INDIAN ARTIFACTS
FEDERAL COURT RULING PROHIBITING PROSECUTION
'Ha!'

# ANTIQUITIES ENFORCEMENT: A PLAINS CONFERENCE SYMPOSIUM

Reported by Bruce Rippeteau

The theory and execution of United States antiquities enforcement, on both state and Federal lands, is essentially a phenomena of the last decade, when compared to the age (over 7 decades since 1906) of the current national Antiquities Act. This recent emergence appears to have occurred in independent states and land management units throughout the West--some enforcement experiences being discouraging, others being successful and effective.

To assist in the sharing of such knowledge among those involved and to apprise other archeologists and anthropologists, a special session on Antiquities Enforcement was held at the 36th Annual Plains Conference in Denver, Colorado, on 9 November 1978. Approximately 140 law officers and archeologists attended this standing-room-only session. Co-chairmen and organizers were John Deans, Special Agent-in-Charge, Bureau of Land Management (BLM), Colorado, and Bruce Rippeteau, State Archeologist, Colorado.

The session was opened by Co-Chairman, State Archeologist Rippeteau, who reviewed recent developments and the organizers' motives for calling this session, Rippeteau also reported that his colleague Dave Madsen, Utah State Archeologist, was in the process of proposing to the Utah legislature a comprehensive state antiquities law which would make the mere selling of antiquities illegal.

A long article prepared at the request of the Journal of Field Archaeology (Kaddee Vitelli, Antiquities Editor) was also distributed as a preprint. This article reviews recent antiquities enforcement experiences in Colorado, along with extensive photographs, memos, and a theoretical discussion of the anthropology of enforcement, violators, and markets. It, "Antiquity Enforcement in Colorado" (Rippeteau, 1978), is scheduled for the January issue of the Journal.

Next, Co-Chairman, Special Agent Deans spoke of his interest as a law enforcement officer in the challenges and worthwhileness of enforcing antiquities matters. John developed the argument that such involvement, to be a success, calls upon the highest technical enforcement skills, and the best of evidenciary process and legal care. He also spoke to the problems of documentation in antiquity enforcement and the role that such enforcement has in agency programming.

Fred Blackburn, Acting Chief Ranger for the BLM, Moab District, in Utah, continued with a slide presentation on the true extent of destruction by pothunters. An interesting aspect, which Fred documented, is the insults, left by the pothunters for the law enforcement crowds. Such insults consist of intentional waste of looted artifacts and the prominent arrangements of skeletal material on the backdirt piles.

Scott Wood, archeologist, Tonto National Forest, Phoenix, spoke about the experiences that Forest Archeologist Martin McAllister and others have had in the use of U.S. Border Patrol "presence sensors." Scott recounted the hours of remote listening to trivial sounds while monitoring an archeological site, and the subsequent prevention of use in court. As it stands now, there are constitutional questions of privacy involved and, at any rate, presence sensors are not in-and-of-themselves evidence. They merely alert law enforcement inspection needs.

Bob Collins, Assistant U.S. District Attorney for New Mexico, spoke about the need for a new national antiquities law and discussed his effort, with Dee Green, to formulate actual wording. Salient characteristics of the proposal, which was circulated, included a new fine of $5,000 and imprisonment for not more than 2 years, $10,000/5 years for subsequent convictions, similar penalties for trafficking in Objects of Antiquity, and definitions of appropriate terms. The proposed definitions, being embedded in the Act, would represent a greater power than current administrative definition.

Jan Friedman, Chief Archeologist, U. S. Forest Service (USFS), Washington, recounted her involvement with a successful prosecution at Hell's Canyon in Oregon. Jan also explained her new section in the ASCA Newsletter as a forum for communication on antiquities matters.

Max Witkind, of San Antonio College, narrated a slide review of his experiences while he served last summer as the antiquities ranger for the BLM, San Juan Resource Area, in southwest Colorado (Witkind 1978). His slides documented the gamut of depredations including conveying the spectacle of two amateur looters attempting to rappel down to a cliff site.

Dee Green, USFS Regional Archeologist, Albuquerque, spoke about recent antiquites events in his jurisdiction. He also spoke to current efforts to influence favorable national legislation, to the necessity of our personal protection when actually involved in approaching antiquities violators, and to the fundamental and useful similarities of archeologists' training to legal, evidenciary processes.

Charles McKinney, Antiquities Coordinator, Office of Archeology and Historic Preservation, Heritage Conservation and Recreation Service, Washington, explained the advanced status of the new antiquity legislation in Washington, D.C.

The session was ended by Richard Somer, formerly Office of the State Archaeologist, Colorado and now at Hamilton College, New York. Richard's remarks concerned the communication gap between our concerns and those of the uninformed public.

This symposium saw a great deal of literature distributed by representatives from state and Federal agencies. Particularly impressive was Texas State Archeologist Curtis Tunnell's conveyance of his Antiquities Code and General Rules of Practice and Procedure. Curtis has prosecuted dozens of antiquities cases in his state over the last decade.

On the whole, this symposium struck a deep chord in the audience: not only for the previously unrecognized, deeply patriotic, and independent efforts of so many law officers and archeologists, but also for the vulnerability and the rate of depredation of our heritage, that ultimate, nonrenewable national resource.

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## PHOTOGRAPHIC EXAMPLES OF SITE DESTRUCTION

Pothunters hole in site 251, Gila National Forest, New Mexico.

Pothunters excavations at site 250, Gila National Forest, New Mexico. Trowell marks a floor level.

Bulldozers at work on a Mimbres site in southwestern New Mexico.

Air view of bulldozed site on private land, New Mexico.

Bulldozed cross-section of Mudsprings Pueblo, private land, Colorado.

Backhoe cut into site 42SA6384 revealed by archeological techniques, San Juan County, Utah.

Air view of Homolovi II showing pothunters pits, State land, Arizona.

Vandalism and relic hunting disturbance at Barn Owl Cave, U. S. Fish and Wildlife Refuse, Utah.

Attempt to remove rock art by sawing, Bureau of Land Management, Utah.

Site in southwestern New Mexico completely obliterated by bulldozer.

# THE STUDY OF VANDALISM TO CULTURAL RESOURCES

Excerpts By Lance R. Williams

There has been little systematic study of the rate or extent of vandalism to cultural resources. We are aware of two efforts one by Greybill (1976) and the other by Williams (1978). Greybill measured and then computed the rates of site destruction along the Mimbres River in southwestern New Mexico. Williams has surveyed the problem throughout the Rocky Mountain West through interviews and questionnaires with various land managers and other knowledgeable people. Since his findings represent a good cross section of those who have and are concerned with the problem we have reprinted a portion of them here, along with his survey of the pertinent literature. (EDS.)

## Overview of the Literature on Vandalism

Vandalism, in the sense of wanton, destructive behavior, has long been a major plague to public facilities in cites, especially school buildings. There now seems to be a general increase across the country in the frequency and intensity of this depreciative behavior. A few years ago, the U.S. Office of Education estimated the annual costs resulting from vandalism in public schools at more than $100 million (Time, 1970). In the same article, the cost of public telephone repairs and replacements due to vandalism during 1970 was reported at about $10 million per annum. This destructive activity in recent years has spread in another domain, National Parks and Forests (Petty, 1966).

Cultural resource vandalism, on the other hand, seems to be on the whole, a characteristically different "type" of depreciative activity than that referred to above. The motives for cultural resource vandalism appear to be of a distinctly different quality and more easily identifiable. For example, collecting, whether for personal collections or profit, seems to be a major underlying motive. As such, the damaging parties would likely be more methodical in their approach and older in age than the youths damaging school buildings.

Looting of archeological sites has been taking place for many years. Meyer (1973) offered an excellent account of the supposed origin of this activity, its evolution through the years, and its current, frightful dimensions. He focused on the interrelationships of looters, art dealers and art collectors, including museums as collectors. The following statement by Meyer sums up his belief as to what comprises the primary motive behind current vandalism to archeological sites: "More than any other single element, the increase in art prices has been responsible for the wholesale theft, mutilation and destruction of art everywhere in the world. . ." (pp. 5-6). According to Meyer, archeological sites are destroyed primarily in the course of searching for objects to sell as art.

Meyer discussed this plunder as a global problem. Many countries are losing their physical cultural remains by this means. In the last 45 or so years the pre-Columbian field has been particularly subjected to looting. It is a "growth" market in art for the following reasons: 1) it is now fashionable, 2) formerly inaccessible areas are being rapidly opened up, and 3) there is more money and more collectors in the art market (Meyer, 1973).

In 1971, the link between the art market and site vandalism was clearly established in this country as a result of the auction of the Green Collection of American Indian Art. The sale, while legal, created new interest in North American antiquities through publicity given the new record-level prices paid for the pieces. Meyer said of the effect: ". . . looting, which was already epidemic, spread with fresh intensity" (1973, 8). Williams reported: "New York auction galleries, which formerly featured materials only from the high cultures of Central and South America, now regularly offer archaeological materials from North America" (1972, 51).

Prehistoric sites in the United States have been luring pothunters for a long while, high market values or not. Much of the pothunting was officially condoned. For example, the states of Colorado and Utah financed pothunters to make collections for their exhibits at the 1893 Chicago World's Fair (Harper's, 1954). The famed Wetherill brothers, "discoverers" of Mesa Verde, led recognized collecting expeditions in the Four Corners region from about 1890 onward (Jennings, 1968). In 1903, Prudden observed that much vandalism had already occurred to these same Anasazi sites (1903).

While the literature dealing with historic culutral material also reflects a concern for vandalism, a pursual of American Antiquity, the official journal of the Society for American Archaeology (SAA), was made for the purposes of illustrating the significance of vandalism to cultural resource professionals throughout a period of time. The issues of this journal, over its 40-plus years of publication, show that archeologists have time and again encountered evidence of injurious vandalism in their pursuit of scientific knowledge. One of the first issues, in 1936, contained an article deploring the lack of a program in the United States to conserve prehistoric remains, for vandalism was already causing a tremendous loss. "From motives of mere curiosity or greed, dealers and relic hunters in practically every state are steadily destroying an irreplaceable heritage" (Setzler and Strong, 1936, 308).

Henry P. Sutton, a Seneca Indian, wrote a resolution in 1938 on behalf of the Indian Neighborhood Society of Rochester which urged the State of New York to enact legislation to prohibit unauthorized and nonprofessional digging of prehistoric sites. The society blamed relic hunters for the destruction taking place (Sutton, 1938).

Hodge (1937) reported in American Antiquity an action taken by the Southwest Museum to prohibit the museum's acquisition of illegally obtained artifacts. This action was meant as a step toward snuffing out the market for such artifacts, museums being major buyers, as they are yet today.

In an article in a later volume of American Antiquity, Robert Ascher (1960) reviewed 10 years of Life magazine in an effort to determine what images the public might have of the profession of archeology. From the articles in Life, he concluded that the public must believe that archeological finds are based on chance, not skill, and that objects and techniques, not ideology, are most important. As a closing thought, Ascher asked, is pothunting a form of copying the profession? In the same volume, Byers (1960) reported the destruction in 1959 of an unusual burial site in Wayland, Massachusetts. Children, their parents, and even amateur archeologists looted and destroyed the site in just miniutes following its chance exposure.

In 1967, the Society for American Archaeology (SAA) presented an "Interim report of the Ad Hoc Committee on the Public Understanding of Archaeology" (SAA, 1967). The committee had been charged with the responsibility for studying means whereby public awareness of the discipline might be increased. Lack of understanding of what the discipline of archeology is all about is surely one major cause of site destruction.

In the early 1970's American Antiquity began to reflect a growing concern for illegal international trafficking in antiquities. The ready market for antiquities appeared to be causing a grand-scale desolation of prehistoric sites, particularly Mesoamerican sites. Adams (1971) wrote an editorial on this subject. The SAA (1971) adopted four resolutions to guide itself and its individual members in helping to bring an end to the trafficking. Beals (1971) suggested methods for controlling and limiting antiquity sales. Robertson (1972) presented a lengthy article on Mesoamerican "stela stealing." Sheets (1973) summarized information on current looting of archeological sites in Mesoamerica, North America, and the Mediterranean, and described a newly-originated form of destruction. Clewlow, et al., (1971) cited examples of archeologically-rich areas in the Great Basin of this country being decimated over a period of time by pothunters.

Located in the volumes of American Antiquity are, without a doubt, other references to vandalism which appear in the texts of technical reports of excavations and studies. Nonetheless, it is clear that professional archeologists have long felt great concern for this cause of the loss of cultural information.

This review of literature on vandalism, particularly in cultural resources, indicates that this has, for quite some time, been a very troubling matter bringing professional pain to archeologists and hampering public enjoyment. Yet, there do not seem to exist any comprehensive, regionally-broad studies focusing on cultural resource vandalism. A good, general description of the problem is missing for virtually all but scattered sites and localized areas.

. . . . . .

## SUMMARY, CONCLUSIONS, RECOMMENDATIONS

### Summary

The present research investigated the management problem of vandalism to cultural resources within dispersed recreation areas of the Rocky Mountain West: Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah, Wyoming, and portions of adjacent states. Because little was genuinely known of the true extent and severity of cultural resource vandalism in this region, or of actual techniques used by resource managers to control the problem, three specific objectives were formulated to overcome these deficiencies. These objectives sought to identify characteristics of the vandalism activity occurring in dispersed recreation areas, to identify and evaluate control techniques used by managers, and to offer recommendations for solutions to problems of cultural resource vandalism.

The instrument used to gather data was a six-page questionnaire circulated to primarily field-level employees of the National Park Service (NPS), the U.S. Forest Service (USFS), and U.S. Bureau of Land Management (BLM), the Colorado Division of Parks and Outdoor Recreation (CDPOR), and the U.S. Bureau of Reclamation (BR). One hundred and sixty questionnaires were tabulated and analyzed. Information obtained through library research, correspondence and conversation, and first-hand field experience provided supplemental data.

The results of the survey, much as they were reported, are here summarized by the following categories: extent of cultural resource vandalism; characteristics of cultural resource vandalism; vandalism control techniques used by managers; agency characteristics; and agency differences.

Extent of Cultural Resource Vandalism. All management areas participating in the survey, with only three exceptions, reported the presence of at least some type of cultural resource. For almost every cultural resource type reported by respondents, vandalism was also indicated as having occurred to that type. Twelve resource types were most frequently mentioned as subject to vandalism. The prehistoric resource types of rock art, open camp sites or chipping stations, and stone or adobe-walled dwellings headed this list. Historic buildings of all types were also very frequently cited as subject to vandalism.

Characteristics of Cultural Resource Vandalism. The most common forms of vandalism were: excavation; defacement; surface collection; removal of boards and timbers; shooting, removing, painting and chalking rock art; and theft of objects from buildings. Respondents believed that stripping of boards, excavation, shooting at rock art, general defacement, and surface collection were most detrimental to the resources of all the forms of vandalism reported.

The forms of vandalism to a particular resource type were found to be limited to a consistent two or three forms, giving evidence of systematic approaches to cultural resource vandalism.

Causing cultural resources to be vulnerable to vandalism were found to be: some factor of attractiveness to a visitor (such as value to a person's collection or on the market); evidence of previous vandalism and natural weathering. Limited law enforcement also contributed to vulnerability. The resource types most sought out by the visitor, because of their attraction for him due to one reason or another, were: open camp sites or chipping stations; rock shelters or caves; stone or adobe-walled dwellings; and rock art.

Cultural resource vandalism occurrences do not seem to depend greatly on a time factor, i.e., day of the week, season of the year, or holidays.

Respondents gave their general impressions of who the vandals were, occasionally being able to support their statements with factual data of recorded incidents. They believed the vandals typically were males, over the age of 30 years, working in groups (probably with one or two other persons), and from towns of 2,500 to 25,000 population which were less than 100 miles away from the vandalized sites. Acting out of motives of personal acquisition or profit, or simply being curious, careless, or ignorant, these vandals gained access most often by two-wheel drive vehicle and to a lesser extent by four-wheel drive vehicle and hiking.

There was reported an upward trend in the frequency of vandalism occurrences for a majority of participating management areas. USFS and BLM respondents most often reported a sharply-rising rate of occurrence. Accounting most for this trend was the factor of greater visitation to the management areas. Also very influential were: visitors' greater knowledge of and access to locations of cultural resources; little law enforcement activity and prosecution; and the public's greater interest in collecting.

Vandalism Control Techniques Used by Managers. Posting of signs was the technique used most frequently by managers to control cultural resource vandalism. Ranger patrol had also been employed quite often. However, over one-third of all respondents reported no real control attempts had been made at all. Other techniques reported as

having been frequently used were: interpretation or education; punitive action; physical barriers; and closing of trails or roads. Several respondents wrote in that they had withheld site locations from visitors. Of the local organizations worked with in order to curb vandalism, archeological and historical societies were most commonly cited. A number of respondents mentioned that resources had been removed following official authorization for such.

As would be expected, the authorized removal of resources was considered the most effective control technique. Closing of trails or roads and erection of physical barriers were also reported as quite effective. Ranger patrol and interpretation were less effective, and posting of signs was felt to be the least effective, despite its prevalent use. The nondisclosure of site locational information was a technique written in, and was believed to be moderately to very effective.

In determining why the management areas had used their particular sets of control techniques, it was found that the three agencies--NPS, USFS, and BLM--had issued guidelines to the management areas concerning cultural resource vandalism, and these guidelines were believed to be applicable to a majority of the vandalism situations represented. However, nearly one-third of all respondents reported low funding levels for protection, likely causing control measures used to be largely makeshift in nature and not very ideal.

Interpretation and education were believed to have the most potential for success as control techniques in limiting the extent of vandalism. Ranger patrol and law enforcement was a second response close in frequency. Low funding levels were presumably a barrier in preventing these techniques from being more fully exploited at the present time.

Respondents were asked to reflect upon the long-range solutions to cultural resource vandalism, and not simply upon immediate control measures. Responses again centered around education and law enforcement.

Agency Characteristics. Some data were obtained which related not so much to vandalism itself or to the resource, but to the agencies responsible for protection.

Given the most emphasis overall as a cultural resource management objective was the inventory and evaluation of all cultural resources. The second most stressed objective was the preservation of selected resources. As a general management objective, recreation was given the greatest emphasis, followed by interpretation and resource development, which were rated about the same in importance. There was low emphasis overall placed upon vandalism damage repair and ranger patrol-law enforcement.

Twenty-eight percent of all respondents claimed their areas had a serious management problem with cultural resource vandalism. When cultural resources were present, but a vandalism problem was largely absent, respondents gave as reasons the isolation and lack of public knowledge of the resource, low visitation to the area, and few and/or low concentrations of the resource.

Over two-thirds of all areas reported having at least one employee capable of recognizing cultural sites.

The Federal Antiquities Act of 1906 was judged not effective as a vandalism deterrent by a large majority of respondents. They pointed to insufficient public awareness of the Act and law enforcement difficulties as the major reasons for its lack of power. Also cited as influential were problems with the prosecution of cases in court and penalties provided by the law being set too low for the present day.

Agency Differences. When appropriate, the data from each of the three primary agencies was analyzed separately. This was done to determine what some of the differences among the agencies might be, both in terms of actual vandalism problems, and in terms of agency policy and management factors which would have a bearing on how cultural resources were handled.

The NPS respondents most frequently reported stone or adobe-walled dwellings as greatly subject to vandalism. The USFS respondents most commonly cited open camp sites or chipping stations, while the BLM respondents most often pointed to rock art as most subject to vandalism in their areas.

The BLM areas may have had more factual information dealing with the characteristics of vandals at the disposal of their respondents than the NPS or USFS could offer their respondents.

Conjecturing from data on the size of population centers from which vandals were likely coming, the BLM areas may have been drawing more local people who vandalize than the other two agencies. Nearly as many people were gaining access to BLM areas by four-wheel drive vehicle as by two-wheel drive. Hiking was almost as common a means of access in NPS areas as two-wheel drive vehicles.

BLM areas would seem to be experiencing the sharpest rise in the rates of cultural resource vandalism occurrences, followed by the USFS. The lowest increase in vandalism occurrences was reported by the NPS, although nearly one-third of these respondents reported an increasing, as opposed to a stationary, rate of occurrence. For all agencies, these trends were much due to greater visitation to management areas. Also cited as important in bringing about increased rates of vandalism occurrences were greater access by visitors to locations of cultural resources, greater knowledge by visitors of resource locations, and little law enforcement activity and prosecution.

Speaking of management objectives or emphases, the NPS most emphasized, under the "cultural resources" heading, the preservation of all cultural resources, whereas the other two agencies stressed the preservation of selected cultural resources. Under "general management," the NPS responses most frequently indicated interpretation, then recreation. The USFS responses showed a nearly equal emphasis upon recreation and resource development. BLM respondents reported the greatest thrust in their agency was in resource development.

It would appear that guidelines issued by the NPS for the prevention of cultural resource vandalism have the best applicability to on-the-ground situations, as opposed to those issued by the USFS and BLM. The NPS respondents also reported the least problems with low funding levels for protection.

The BLM appears to have a higher percentage of employees who are able to recognize cultural sites. Also, the greatest percentage of respondents not believing the Antiquities Act to be an effective vandalism deterrent were BLM employees. The percentage was somewhat less for USFS respondents, and lower yet, although still high, for NPS respondents.

Over one-half of all BLM respondents reported having in their areas a major management problem with cultural resource vandalism.

## Conclusions

The following are the major conclusions found as a consequence of the research:

1. Cultural resource vandalism is a problem confronting virtually all 160 dispersed recreation areas surveyed, and is becoming worse in many of them.

2. While nearly every resource type is affected, prehistoric resource types and historic buildings are particularly subject to vandalism, much of which is very destructive to the resource.

3. Forms of vandalism for any resource type were generally limited to a few, much-employed forms, evidence that it might be a planned, systematic activity; only for rock art does there appear to be major elements of vandalism as it is commonly thought of in its "wantonly destructive" sense.

4. Motives for vandalism can be largely attributed to a desire to collect for personal acquisition and monetary gain, and to sheer ignorance, carelessness, and curiosity.

5. The incidence of vandalism is very much affected by the level of visitation to these management areas, which is on the increase in most areas, and by the fact that many visitors now have off-road vehicles which are capable of providing access to formerly isolated areas.

6. Many vandals are people living in the vicinity who know the land and its resources. These people are generally adult males, who go out in groups, and, most of the time when doing so, have specific purposes in mind. Their transportation is largely by two-wheel and four-wheel drive vehicles. From repeated visits, they often know the habits of resource managers and visitors, and thus learn to avoid them while pursuing their vandalistic activities. Many other people who vandalize seem to have no intention of being destructive, but because of their ignorance, carelessness, and curiosity regarding cultural resources they become destructive without really being aware of it.

7. Many different control techniques have been tried by resource managers; however, success has been limited. This is likely due to a lack of both understanding of the problem and how to treat it (for example, the posting of signs), and to insufficient funding to support additional staff, to purchase needed equipment and materials, and to accomplish other tasks preliminary to adequate resource protection. In addition to low funding, agencies are not providing, to the extent possible, guidelines which are applicable to varied circumstances of vandalism. There also does not seem to be occurring an active interchange of ideas concerning cultural resource vandalism among management areas, whether belonging to the same agency or not.

8. While authorized removal of the resource, closing of trails and roads, and erection of physical barriers had proven the most effective, a combination of education and law enforcement would seem to hold the best possibilities for curtailment of vandalism.

9. Proper and timely maintenance of the resource would seem to be quite important in overcoming the negative effects upon visitors of the evidence of previous vandalism and natural weathering.

10. Characteristics of a resource-managing agency probably have a great deal to do with the amount of vandalism it experiences. According to the survey, the NPS stresses interpretation, and the preservation of all cultural resources, and undoubtedly receives greater funding for its cultural resources programs. That the NPS areas are experiencing the least vandalism problems may be a direct result of these emphases. Indeed, all goals, objectives, policies, and practices must work to the benefit of cultural resources if the incidence of vandalism is to be low. When there are conflicts and inconsistencies among these goals, objectives, policies, and practices in regard to cultural resources, vandalism is bound to be a

byproduct. For example, a policy of selective preservation, while being by far more realistic than preservation of all cultural resources, may be a forerunner of vandalism. Does the potential vandal know which resources are being set aside for preservation and why? Does this policy mean to them that the remaining resources are open to plunder? These are serious questions to be asked if such a policy is not to lead to detrimental activities by the public. Designated historic areas, under the jurisdiction of the NPS, are an example of goals, objectives, policies, and practices all being designed to benefit the cultural resources within these areas. In the survey, these areas reported the lowest incidences of vandalism among all types of management areas.

## Recommendations

The recommendations that follow are based on the findings of the study, and are directed toward cultural resource managing agencies at two general levels: on-the-ground management, and state, regional, and national offices. Personnel at these levels can exert some control over the vandalism problem, yet the work of one level cannot entirely be done at the other. Efforts must be made at each level if the present rates of incidence and seriousness of vandalism are to be seriously confronted. Clearly, there will be some necessary overlap in the initiatives each level can make, and in all actions there must be understanding and mutual support between resource managers (i.e., on-the-ground) and higher-level agency administrators.

Recommendations to State, Regional, and National-level Agency Personnel. It is recommended that higher-level administrators undertake the following:

1. Conduct all agency affairs, including policy, priority, and funding decisions, with a sincere interest in preserving cultural resources and with a thorough understanding of the ways in which their preservation can be threatened.

2. Enlarge present programs of inventorying and evaluating cultural resources. Hire or contract with trained professionals who are capable of providing leadership to these programs and who can comment on the extent and seriousness of vandalism taking place. Make nominations of qualifying cultural assemblages to the National Register of Historic Places.

3. Provide training to field employees in areas of cultural resource inventories, care, and protection.

4. Provide useful guidelines to field managers for the control of cultural resource vandalism.

5. Begin a geographically-wide and intense program of education, relying upon the various media, and calling upon professional archeologists and historians for advice and leadership. Develop means of involving the public in preservation and protection programs and campaigns.

6. Prevail upon the U. S. Congress to amend the 1906 Antiquities Act to change vague or confusing wording and to strengthen penalties.

7. Urge state legislatures to adopt imaginative, sound, and well funded plans and procedures for the education of citizens and the protection of resources.

8. Write and enforce agency regulations that would supplement the Antiquities Act and allow for swift prosecution of cases.

9. Develop and fund law enforcement programs that would be closely allied with educational efforts on-the-ground. Provide training in law enforcement to field employees.

10. Promote cooperation among law enforcement officials and judiciary--Federal, state, county, and local--who work within common geographical areas.

11. Organize interagency workshops where cultural resource vandalism would be discussed, control techniques shared and evaluated, and long-range solutions sought.

12. Urge museums not to purchase or otherwise accept illegally-obtained cultural materials, and urge members of Congress to adopt legislation that would strictly regulate domestic sales of artifacts.

13. Allow survey and excavation permits to archeologists to be authorized only on the condition that there be prompt local display of artifacts retrieved. Work jointly with sponsoring institutions to provide facilities for display purposes.

Recommendations to On-the-ground Resource Managers. It is recommended that field-level managers undertake the following:

1. Participate (and direct, when appropriate) in cultural resource inventories and evaluations, and receive training in cultural resource management.

2. Make all management decision and carry out actions with an understanding of their effects (especially vandalism effects) on cultural resources of the management area.

3. Contact citizen groups, organizations, institutions, community leaders, and cultural resource professionals in nearby communities and begin educational programs which encourage the personal involvement of people in planned efforts to care for and protect cultural resources.

4. Develop well-planned law enforcement efforts which utilize manpower and equipment, however limited, to the best advantage. All management of staff should produce the highest possible visibility of them to the public. Closely integrate educational, interpretive, and law enforcement programs.

5. Develop strong on-site information and interpretive programs which stress personal contact and de-emphasize hard-line, authoritative approaches to informing visitors about cultural resources and laws and regulations affecting them.

6. Meet with local law enforcement personnel and judicial officials to explain the agency's stand on cultural resource vandalism. Urge their cooperation and consistent approach to apprehending and prosecuting individuals involved in cases under their respective jurisdictions.

7. Work with private individuals and companies who own land which receives resource vandalism, authorized or not. Gain their understanding and cooperation in treating the problem consistent with the agency's approach. Assist them in as many ways as possible.

8. Develop ties with nearby field managers of the same and different agencies, and meet to discuss problems being experienced with vandalism.

9. Do not reveal locations of cultural resources when this is likely to unnecessarily endanger them. Post regulative and interpretive signs only when the presence of the resource is obvious. Signs should be positive and not greatly authoritative-sounding.

10. Maintain or create difficult access to unprotected resources through such means as closing roads and erecting barriers. Natural barriers such as piled brush or live vegetation blend in well with the surroundings, and call less attention to begin with to the resource.

11. Publicize the existence and content of the 1906 Antiquities Act.

These recommendations, if followed at the agency levels mentioned, should result in a lessening of the management problem, in dispersed recreation areas, of cultural resource vandalism. All that can possibly be done must be done in order to preserve what physical heritage is yet intact. If not, it will surely be ". . . a sad paradox that at this time, when trained men are becoming available and new techniques for determining archaeological history are reaching a high pitch of development, the materials themselves should be vanishing like snow before the sun" (Setzler and Strong, 1936, p. 309).

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# CULTURAL RESOURCE PROTECTION:
# SOME CONSIDERATIONS

by

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Archeological site destruction in the United States can be viewed as steming from several causes. Foremost, of course, is the lack of public education and awareness of the problem. Other important factors are the lack of training, concerning site protection, of many agency personnel and the low priority assigned to protection by the state and Federal agencies involved in land management. At the root of the above factors is a general failure by the professional archeological community to provide education both to the general population and to the professional land manager. The typical graduate student in archeology is taught that pothunters have no redeeming virtues and should be avoided and rarely, if ever, are they taught the need or means for providing public education. The result is that professional archeologists all to often are both ignorant of the extent and nature of the problem, and the means to effect changes.

The general lack of concern for archeological resources in the United States as contrasted with other countries has existed to a greater or lesser degree for at least 100 years. It was undoubtedly enhanced by the slow growth of archeology as a discipline and by attitudes toward native Americans which encouraged the belief that their history and accomplishments were of little cultural importance. Fortunately, archeology is maturing as a discipline, moreover in part, because of the documentation provided by archeologists, the general public is to a large extent aware of the importance of the American Indian cultures and an interest in their history now exits.

Unfortunately, this new respect for native American cultures has been in part directed toward the collection of prehistoric artifacts which are recognized as important pieces of art. This has led to a quantum leap in the value of these objects and as a result commercial pothunting has become a very significant factor in site destruction. At the same time the widespread availability of power earth-moving and of off-road vehicle equipment has led to the inadvertant destruction of sites on an unprecedented scale.

It is not unfair to argue then, that we have reached a crossroads in site protection. Public sentiment toward the protection of sites is stronger than it has ever been (although public education is still very inadequate), but the forces of commercial looting and mechanical site destruction are also at their peak. We clearly have the opportunity as well as the pressing need to institute major new efforts and encourage new attitudes toward archeological site protection.

## The Changing Atmosphere in Arizona and New Mexico

The situation in Arizona and New Mexico probably exhibits this dichtomy of increased effort and increased problem more graphically than anywhere else in the country and therefore, is worth evaluating. Early in the 1970's commercial bulldozing for pots was first developed and perfected in southwestern New Mexico. As a consequence, site destruction was as severe in this area as anywhere in the United States, if not the world. However, a number of events rapidly changed the situation. In 1977, the New Mexico legislature passed a bill restricting the use of mechanical equipment for pothunting on private land. This bill was a landmark for site preservation in the United States. At the same time, law enforcement and prosecution of pothunters on the National Forests in the same area became undoubtedly the most vigorous and successful in the United States. Soon thereafter, the Bureau of Land Management took very positive steps toward site protection on the lands they administer in the area. Thus in the space of 5 years the situation changed remarkably, and southwestern New Mexico and probably the State as a whole began to witness less pothunting than it did in 1970. Furthermore, as these efforts and concerns became more widely known the congressional delegation from the State recently came out very strongly for more adequate protection of sites on Federal land.

A similar situation exists in Arizona. Here, again, commercial pothunting has become very significant in the last 5-10 years, and as McAllister (this volume) points out site destruction is very severe in the State. Again, however, positive efforts are being taken. The widely viewed Public Television program on site destruction (Thieves of Time) was produced in Arizona, and a bill restricting pothunting on private land was narrowly defeated by the State legislature in 1978. Again, law enforcement and prosecution of pothunters on public land has taken major steps forward in the last few years, although because of the Diaz decision these efforts have not been as successful as in New Mexico.

It should be noted that at the heart of each of these situations is the increased awareness of the value of prehistoric artifacts on the one hand and public education as to the importance of these sites on the other. Based on observations in these two States, it appears that the problem of site destruction is in large part a result of the public's being taught the wrong lesson; that artifacts are valuable in their own right. To protect sites, we must vigorously show that it is the sites that are valuable. Finally, in these two States the most important steps were taken by nonarcheologists and it must be recognized that the protection of sites largely rests in the hands of public servants who have little experience with archeology per se.

## A Holistic Approach to Site Protection

Another important aspect of site protection is the realization that it consists of a series of interrelated problems with interrelated solutions. Paramount among these relationships is that one should not see the problem as restricted to particular land statuses or localized areas.

In the Mountain West, at least, land status seems to have little to do with where pothunting occurs. One pair of individuals in New Mexico is known to have conducted large scale commercial pothunting on private, State, Bureau of Land Management, and National Forest lands. Under such circumstances vigorous enforcement on one class of land might be expected to shift looters to other areas, but this does not seem to be the case. Instead, enforcement seems to be a very effective form of public education. Not only is the message delivered that one will be prosectued if they pothunt on Government land, but that pothunting is considered by a great number of people to be wrong. Thus, enforcement, while often focused on the commercial looters, does provide an educational concept to occasional diggers and nondiggers as well. The net result is that pothunting is reduced at all levels.

Unfortunately, effective enforcement has barely begun. As yet there seems to be no attempt to integrate enforcement efforts between various responsible organizations, nor have there been efforts to pool information about commercial looters. Although hundreds of thousands of dollars worth of artifacts have been recovered from single sites, we know of no cases of grand juries being convened, nor special investigations made of this large scale theft of public property.

Moreover, public education especially by means of interpretive sites has been left almost exclusively in the hands of the National Park Service. Concerted efforts by agencies like the Bureau of Land Management, Forest Service and various State park divisions to demonstrate that sites outside the National Parks are also of significance have barely begun. Also noticeably lacking are efforts to have developed interpretive sites near urban areas so that large numbers of school children will visit them on an organized and regular basis.

It is hopefully been made clear from the previous papers that site protection cannot be conceived of as a land specific or agency specific problem. On the other hand, what is also becoming increasingly clear is that considerable headway can be made with relatively little effort. Steps taken by any agency have positive effects over wide regions and on all classes of land. We can see that the vast majority of people today feel that archeological sites are important and it doesn't take much effort to see that

their interests and concerns are channeled into positive directions.

## Recommendations

The previous papers in this volume have provided a number of very good suggestions for improving site protection efforts and there is little reason to reiterate them here. Several further comments are warranted. Of central concern is that there is no organization that coordinates the efforts of the various Federal agencies in site protection. There are several reasons for this. One is that due to recent legislation, there has been an incredible increase in the concern for the protection and mitigation of sites endangered by Federal projects. This has led to agencies expending enormous efforts to direct these programs and to see that mitigation efforts are conducted. Thus, the President's Advisory Council on Historic Preservation exists as a review agency, but its direction is almost exclusively toward mitigation concerns. It is our opinion that were a small fraction of the monies spent on Federal mitigation spent on generalized site protection, hundreds more significant sites would be protected than is presently the case. Or viewed differently, the nature and extent of archeological involvement in site protection is to a very large degree dictated by where roads, dams, fences, etc., are being placed, not by where managers see the greatest need of potential for these funds. This inbalance must be corrected if overall site protection is to proceed effectively.

It might have been expected that the formation of the Historic Conservation and Recreation Service in Washington would have served as the means to coordinate site protection activities. However, this agency seems to be carrying out other programs and not coordinating efforts at site protection between various jurisdictions or taking a leading role in public education concerning site vandalism. Here again the fault probably lies with the archeological community which does not seem to have voiced concern nor educated the policy makers in Washington about the needs and potential results of such actions at the Federal level.

Another area where a new attittude is needed is that of interpretive sites. Not only do well interpreted archeological sites provide a source of pleasurable recreation for many people, but they are an extremely effective means of public education about site protection. Other agencies must become active in site interpretation and the idea that this is the exclusive domain of the Park Service must be abandoned.

Related to this need is the need to integrate interested avocational archeologists into site protection in a positive way. The potential for coordinated program of professionals and avocationalists has been demonstrated in numerous instances and the success such programs have in England is widely recognized. However funds are generally

not available to institute such programs on the scale needed or desirable.

## Conclusion

Site destruction by looters, especially commercial pothunters, has become increasingly severe in recent years. Conversely, enforcement and preservation efforts have been small scale until very recently. However, current efforts in large part by nonarcheologists have been effective. If increased law enforcement were combined with more effective public education the current wave of destruction could be effectively stemmed.